No. 83-5767

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

MICHAEL DALE LEATHERWOOD,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MISSISSIPPI

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## QUESTIONS PRESENTED

1. Since Mississippi's death penalty statute requires the "balancing" of aggravating and mitigating circumstances, does an invalid duplication of aggravating circumstances unconstitutionally taint the "balancing process" -- when the invalid circumstances were weighed against statutory mitigating circumstances to sentence petitioner to death?

2. May Mississippi constitutionally impose a death sentence based on an aggravating circumstance that the murder was "especially heinous, atrocious or cruel" -- if, without defining this standard, it seeks to establish the aggravating circumstance by compelling the defendant to reenact before the jury his role in the crime?

3. May Mississippi in a death sentencing hearing, consistent with Lockett v. Ohio and Eddings v. Oklahoma, refuse requested jury instructions (a) that death need not be imposed when an aggravating circumstance is found, and (b) that specific mitigating circumstances need not be found to return a sentence of life?

4. Whether a state court reviewing a death sentence for proportionality has unlimited discretion in how that review is conducted -- or whether some objective criteria must be articulated and applied in the proportionality review?

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## OPINIONS BELOW

The opinion and judgment of the Mississippi Supreme Court is reported at 435 So. 2d 645 (Miss. 1983). It appears as Appendix 1, at App. 1a. The trial court did not issue an opinion; however, it prepared a sentencing report for the Mississippi Supreme Court. Its judgment appears as Appendix 3, at App. 22a and its sentencing report appears as Appendix 4, at App. 24a.

## JURISDICTION OF THE COURT

The Mississippi Supreme Court issued its opinion and judgment on May 25, 1983. Appendix 1, at App. 1a. On August 17, 1983, the Mississippi Supreme Court by written order denied petitioner's timely motion for rehearing. Appendix 2, at App. 21a.[1/]

The jurisdiction of this Court is conferred by 28 U.S.C. § 1257(3).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in pertinent part that no State shall:

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1/ The reported decision indicates that a motion for rehearing was also denied on June 24, 1983. Leatherwood v. State, 435 So. 2d 645 (Miss. 1983). However, this notation is apparently in error because the Mississippi Supreme Court did not issue any order on that date.

> Deprive any person of life, liberty, or property, without due process of law. . . .

Mississippi Code Ann. §§ 99-19-101, 103, 105 and 107 (Supp. 1982) are set forth in Appendix 5, at App. 31a.

## STATEMENT OF THE CASE

Petitioner Michael Leatherwood pled guilty to one count of felony-murder (called "capital murder") in Mississippi. Proceedings before the trial court and a jury related solely to sentencing. Petitioner was sentenced to death based on events which occurred in a three-day period between August 22 and August 25, 1980.

In August 1980, petitioner was eighteen years old. He had no prior criminal record and had been an honor student with an A-minus or B-plus average (R. 642). The previous April, petitioner suddenly dropped out of school, six weeks before his high school graduation, and enlisted in the U.S. Army (R. 642, 674). In August 1980, he had been in the Army for four months and was stationed for basic training at Fort Polk, Louisiana (R. 629).

On August 13, a fellow soldier, Jerry Fuson, asked petitioner to drive him to Jackson, Mississippi to pick up Fuson's car, which had broken down a few days earlier. Another soldier and mutual friend, George Tokman, joined them. Fuson agreed to pay all expenses of the trip (R. 682).

After the three soldiers got off duty on Friday, August 22, they drove to Jackson (R. 682). They stayed up all night and, after they retrieved the car, Fuson revealed for the first time that he had only $10.00. This was insufficient to pay for their return to Fort Polk. The three tried to get military assistance called "Comfort Pay," but were told they were ineligible because they were not in Jackson on official

leave. They tried another financial aid source, but found it closed (R. 607, 685-86). By this time (the night of August 23-24), the three soldiers had been awake forty hours (R. 696, 885).

To obtain money, George Tokman devised a plan to rob a cab driver. Tokman was the acknowledged leader of the group (R. 608, 611, 687-88). Fuson helped Tokman plan the robbery, designating the role of each participant (R. 610, 691). Under the plan, Tokman and petitioner were to sit in the back seat and subdue the driver, petitioner sitting behind the driver and using a rope. Fuson was to sit in the front seat and collect any valuables (R. 607-10; 690-91).

Tokman then proceeded to call several cab companies. Tokman rejected the first cab because the driver was too young and big. He rejected another cab for no stated reason (R. 690). When the next cab arrived, the three soldiers got in and Tokman gave the driver an address. Upon arriving at the destination, Tokman waved a pocketknife at petitioner and motioned him to throw the rope around the driver. Petitioner complied. When the driver resisted and began to climb over into the back seat, Tokman stabbed him three times to death (R. 691).[2/] The robbery netted approximately $11.00 (R. 596, 712).

Tokman wounded himself in the stabbing. While he sought treatment in Vicksburg the following day, August 24, petitioner and Fuson falsely used a credit card obtained from the taxi driver and stole a wallet. Returning to Louisiana, petitioner aided Tokman in robbing a convenience store (August 24), and petitioner and Fuson assisted Tokman in robbing a

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2/ Fuson, who later turned state's evidence, testified that Tokman and petitioner had "decided" not to leave any witnesses, but did not indicate petitioner's role, if any, in the discussion (R. 590). Another fellow soldier, James Kellison, testified that a week later he heard petitioner say he told Tokman to stab the victim (R. 565). Fuson, however, did not so testify.

motel (August 25). They returned to Fort Polk and, on August 29, they were arrested.

Petitioner waived his Miranda rights and gave a full confession. Neither Fuson nor Tokman cooperated at that time, although Fuson later turned state's evidence. Petitioner was tried in Louisiana for the two robberies and sentenced to six and fifteen years respectively without parole. He then pled guilty to capital murder (felony-murder) in Mississippi. The State sought the death penalty.3/

**The Sentencing Hearing**

At his sentencing hearing, petitioner testified on his own behalf. He also called four other witnesses to testify about his background, his character and his spotless record apart from the three days in August 1980.

In his subsequent sentencing report, the trial judge cited evidence supporting three statutory mitigating factors: the age of the defendant (petitioner was eighteen); the absence of prior criminal activity; and that defendant may have acted under the substantial domination of another person, Tokman. On the latter point, the judge's sentencing report states:

> There was considerable testimony that the leader of the three was Tokman. The Defendant testified that he was frightened of Tokman and that Tokman waived [sic] a knife at him immediately prior to the murder.

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3/ Tokman pled not guilty, was tried and convicted, and then separately sentenced to death. See Tokman v. State, 435 So. 2d 664 (Miss. 1983).

(App. at 26a.)[4/]

The jury ultimately found four aggravating circumstances:

1. That the murder was committed while in the commission of a robbery.

2. That the murder was committed for pecuniary gain.

3. That the murder was especially heinous, atrocious or cruel.

4. That the murder was for the purpose of avoiding a lawful arrest.

The first two aggravating circumstances -- that the murder was carried out "in the commission of a robbery" and "for pecuniary gain" -- did not rely on separate evidence. Both were based on the single fact that the murder occurred during a robbery. Hence they were duplicative.

The third aggravating circumstance -- that the murder was especially heinous, atrocious or cruel -- gave rise to a challenged event at the sentencing hearing. On cross-examination, over objection, petitioner was compelled to reenact in

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4/ The judge's report cited other mitigating evidence. He said the defendant was "very well conducted" and displayed a "genuine feeling of remorse." App. at 24a. He noted that defendant gave a full confession, that defendant had not slept for 40 hours before the crime, and that he testified he did not truly believe that the robbery and murder would be carried out. App. at 26a. Petitioner himself testified at the hearing:

> I felt ashamed that I did them. I feel sorry for the victims, both Mr. Jackson and the people that were involved in the armed robberies. I feel sorry for what I have done to my parents. I have wrecked almost totally everything they ever worked for. Everything they ever tried to make me believe in, in the space of a few days, I totally destroyed it. I have destroyed their home. I have put extreme mental and financial burden on them and I have made them loose [sic] confidence in me. Everything that they had done from the time I was a little kid until then, that, in a space of those few days, it was as if it was a piece of paper to me and I had wadded it up and thrown it away (R. 708-09).

front of the jury how he held the rope around the cabdriver's neck. The dramatization was upheld by the Mississippi Supreme Court on the ground that it supported the aggravating factor of whether the murder was "especially heinous, atrocious or cruel." No other definition of this standard was provided to the jury.

To support the fourth aggravating circumstance -- that the murder was for the purpose of avoiding a lawful arrest -- the State relied on Fuson's testimony that Tokman and Leatherwood had "decided" they would leave no witnesses. There was no testimony concerning the precise nature of the discussion, or concerning what role, if any, petitioner played in the discussion.

Before closing arguments, over petitioner's general objection, the trial judge granted the state's requested instructions. Appendix 6, at App. 39a. At the same time, the trial judge rejected six of petitioner's twelve requested jury instructions. Two of petitioner's rejected instructions attempted to apprise the jury (a) that death need not be imposed even if an aggravating circumstance was found and (b) that no specific mitigating circumstances needed to be found to return a sentence of life:

> Rejected Jury Instruction No. 22
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> The Court instructs the jury that the prosecution carries the burden of showing not only that aggravating circumstances exist but also that they are sufficient enough to warrant death. If the prosecution merely proves the existence of an aggravating circumstance, you are free to find it insufficient to warrant death and are not required to automatically impose death.

> Rejected Jury Instruction No. 25
>
> You are instructed that you need not find any mitigating circumstances in order to return a sentence of life imprisonment.

Instead, the judge gave the State's requested instruction that "if, after weighing the mitigating circumstances and the aggravating circumstances, one against the other, you further find unanimously from the evidence beyond a reasonable doubt that the aggravating circumstances out-weigh the mitigating circumstances and the death penalty should be imposed," the jury "shall" return a sentence of death. In addition, these instructions treated all general mitigating evidence concerning "defendant's life and character" as but a single mitigating circumstance that the jury was to "balance" under Mississippi's procedure together with other individual mitigating and aggravating factors.

## Appeal and Review of Sentence

Under the Mississippi death penalty statute, the Mississippi Supreme Court must automatically review every death sentence within sixty days, even if no appeal is lodged. Miss. Code Ann. §§ 99-19-101(4) and 99-19-105 (Supp. 1982). Petitioner appealed and contended, inter alia, (1) that the first two aggravating circumstances (robbery and pecuniary gain) were duplicative and hence invalid; (2) that it was error to compel petitioner to reenact, with a rope, his role in the crime; and (3) that the imposition of the death penalty in his case was excessive and disproportionate under the Eighth Amendment.[5/]

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5/ Moreover, petitioner argued that the imposition of the death penalty where he "did not kill, attempt to kill or intend to kill" was violative of the Eighth Amendment under Enmund v. Florida, ___ U.S. ___, 102 S. Ct. 3368 (1982).

Petitioner further contended that there was no basis to instruct the jury to consider, as an aggravating circumstance, that the murder was committed to avoid or prevent "a lawful arrest" -- otherwise "every murder during a felony could be characterized as an attempt to avoid a lawful arrest, thus

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By a six-to-three vote, the Mississippi Supreme Court (a) reviewed and affirmed the sentence and (b) rejected petitioner's appeal. On petitioner's claim that "robbery" and "pecuniary gain" were duplicative, the Court said that it had previously held such duplication not to be error. It noted that petitioner did not raise this specific contention until a motion for new trial.[6/] Yet, "[i]n cases where we feel that the asserted error has merit and that it unduly prejudiced the appellant, we may raise it as an apparent error on the fact of the record of the Court's own motion," even if not properly preserved by timely objection. 435 So. 2d at 650. However, the Court found no such prejudice in this case because of its prior decisions that duplicative aggravating circumstances were permissible.

The Court also rejected petitioner's claim that the forced reenactment of the crime, over objection, was error. It found the demonstration to be relevant to an aggravating circumstance -- that the murder was "especially heinous, atrocious or cruel." It then said that the terms "'especially heinous, atrocious and cruel' . . . are proper without further definition for a jury and constitutional in light of the plurality opinion in Godfrey v. Georgia, 446 U.S. 420 (1980)." 435 So. 2d at 655.[7/]

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(Footnote 5 continued)

causing another automatic cumulation of aggravating circumstances." The Mississippi Supreme Court disagreed, noting Fuson's unspecific testimony that the three soldiers had "decided" not to leave witnesses. See page 7, supra.

6/ Although petitioner had objected at trial to the instruction containing these duplicative factors, the motion for new trial was the first time the specific contention was raised.

7/ Thus, although petitioner did not articulate this issue in federal constitutional terms, the Court did address the federal question.

Finally, the Court rejected petitioner's claim that the imposition of the death penalty was excessive and disproportionate under the Eighth Amendment. It did not articulate detailed reasons for this conclusion or identify objective criteria for conducting its review of the proportionality of petitioner's death sentence.

Justice Robertson dissented, stating that it was error for the trial court to have rejected petitioner's requested Jury Instruction 25 -- and Jury Instruction 22 -- regarding the jury's discretion to impose a life sentence. Petitioner did not raise this point on his own appeal. Justice Hawkins specially concurred in his dissent to state that although the failure to give Jury Instruction 25 warranted reversal of the death sentence, it should not be inferred that the Court was under an obligation in all cases to search the record for errors not raised by counsel.

In a motion for rehearing, petitioner raised the dissent's issue regarding the failure to give Jury Instructions 22 and 25. The motion for rehearing was denied on August 17, 1983.

## REASONS FOR GRANTING THE WRIT

### I. AN INVALID DUPLICATION OF AGGRAVATING CIRCUMSTANCES, WHEN STATUTORY MITIGATING CIRCUMSTANCES ARE PRESENT, INVOLVES AN IMPORTANT QUESTION LEFT OPEN BY BARCLAY V. FLORIDA AFFECTING ALL STATES WITH DEATH PENALTY "BALANCING" STATUTES.

This case presents an important question left open last term by Barclay v. Florida, ____ U.S. ____, 103 S. Ct. 3418 (1983); viz, when a death penalty statute requires the "balancing" of aggravating and mitigating circumstances, does an invalid aggravating circumstance taint the "balancing process," if statutory mitigating circumstances are also

present. Granting certiorari would permit the Court to address this important issue left open by Barclay.

a. In Barclay v. Florida, Justice Rehnquist's plurality opinion concluded that it was constitutionally "harmless error" for a death sentence to be imposed in the face of an invalid aggravating circumstance -- at least where the sentencing court found no mitigating circumstances under the Florida statutory "balancing" scheme. 103 S. Ct. at 3428. The central question was whether the presence of an invalid aggravating circumstance infected the Florida procedure:

> The crux of the issue, then, is whether the trial judge's consideration of this improper aggravating circumstance so infects the balancing process created by the Florida statute that it is constitutionally impermissible for the Florida Supreme Court [to] let the sentence stand.

Id. at 3427-28. With no statutory mitigating circumstances present, Justice Rehnquist found the process not to be infected by the invalid aggravating circumstance in Barclay. Id. Justice Stevens' concurring opinion also focused on the absence of statutory mitigating circumstances:

> Under Florida law, if there are no statutory mitigating circumstances, one valid statutory aggravating circumstance will generally suffice to uphold a death sentence on appeal even if other aggravating circumstances are not valid. The federal Constitution requires no more, at least as long as none of the invalid aggravating circumstances is supported by erroneous or misleading information.

Id. at 3433 (footnotes omitted).

The Mississippi statute in this case similarly involves a balancing process. However, unlike Florida, the sentence in Mississippi is determined by the jury alone and the jury is instructed to make findings only concerning aggravating circumstances; it does not make findings on mitigating circumstances. Miss. Code Ann. § 99-19-103 (Supp. 1982). The best that can be achieved, in light of Barclay, is to determine

whether or not there is substantial evidence to support one or more of the statutory mitigating circumstances.

In the present case, there was ample evidence, recited in the trial judge's Sentencing Report, to support at least three statutory mitigating circumstances:

-- Petitioner had "no significant history of prior criminal activity" -- indeed, no criminal activity other than the events of August 23-25, 1980. Miss. Code Ann. § 99-19-101(6)(a) (R. 885).

-- The defendant acted under "the substantial domination of another person." Miss. Code Ann. § 99-19-101(6)(e). Petitioner testified in his own defense that he was motivated by fear of his co-defendant, Tokman (R. 691), who waved a knife at him prior to the robbery/murder. All witnesses testified that Tokman, not petitioner, conceived of and planned the robbery, and was the leader of the group (R. 608, 611, 687-88, 885).

-- "The age of the defendant at the time of the crime." Miss. Code Ann. § 99-19-101(6)(g). Petitioner was eighteen years of age (R. 883).

At the same time, the trial court permitted an invalid duplication of aggravating circumstances from a single aspect of the defendant's conduct. From the sole fact that petitioner participated in a robbery when the murder was committed, the jury found two aggravating circumstances -- that the murder was committed (1) in the commission of a robbery, and (2) for pecuniary gain -- and it injected both into the statutory "balancing" process.

Where statutory mitigating circumstances exist -- as they do here -- and where the statutory procedure requires a sentencing jury to "balance" aggravating against mitigating circumstances, the presence of an invalid aggravating circumstance necessarily creates a risk of unreliability in the sentencing procedure. Such unreliability is constitutionally unacceptable where the death penalty is involved. Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

At issue is not the "classification" of petitioner as a person against whom the death penalty might be imposed. Mississippi, like Florida and Georgia, requires the existence of only one aggravating factor to cross this first threshold. Rather, at issue is the procedure under which petitioner was "selected" as a person against whom the death penalty shall be imposed. See Zant v. Stephens, _____ U.S. _____, 103 S. Ct. 2733, 2744 (1983). As this Court recently stated in Zant, "[w]hat is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime." Id. Mississippi, by statute, bases the selection stage almost entirely on the balancing of specific statutory factors. The Mississippi statute directs the jury to focus its deliberations on three matters:

> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5) of this section;
>
> (b) Whether sufficient mitigating circumstances exist as enumerated in subsection (6) of this section, which outweigh the aggravating circumstances found to exist; and
>
> (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

Miss. Code Ann. § 99-19-101(2)(a)-(c) (Supp. 1982) (emphasis added).

Thus, Mississippi juries are to decide the sentence and select for death "based on [the] considerations" prescribed by statute -- specifically, whether "sufficient" mitigating circumstances exist to outweigh prescribed aggravating circumstances. Petitioner's jury was instructed in accordance with the statute. By injecting "duplicative" aggravating circumstances -- factors which duplicate but a single aspect of the defendant's character or conduct -- there was an increased risk that the jury would not deem the mitigating factors applicable

to petitioner "sufficient" to grant life. It is an arbitrary risk. A participant in a robbery like petitioner faces a "balancing process" with two aggravating circumstances facing him; whereas a rapist or hired killer would have only one.

The selection phase of a death sentencing procedure -- when it depends on weighing specified considerations -- cannot tolerate such arbitrary possibilities. It is debatable whether these risks might be cured by a limiting instruction -- e.g., that the jury should not tally up the aggravating and mitigating factors in a numerical fashion. But no such limiting instruction was given in this case. Indeed, as discussed in point III below, the trial judge rejected petitioner's other requested instructions to overcome the limited scope of Mississippi's balancing process. Nor did the Mississippi Supreme Court's proportionality review cure this problem, as discussed in point IV.

At minimum, petitioner was entitled to a fair balancing of statutory aggravating and mitigating circumstances under the Mississippi procedure. The injection of invalid aggravating circumstances -- through the duplication of "robbery" and "pecuniary gain" as separate aggravating factors -- presents, in these circumstances, a substantial risk of an unreliable "balancing," and hence an unreliable selection procedure. This is the important federal question left open by Barclay.

b. Several states have "balancing-type" death penalty statutes. See Appendix 7, at App. 49a. At least three of these states, Florida, Alabama and North Carolina, have considered the issue of "duplication" and have reached an opposite result from Mississippi. In Provence v. State, 337 So. 2d 783 (Fla. 1976), cert. denied, 431 U.S. 969 (1977), involving a robbery-murder, the Florida Supreme Court reversed a death sentence because two aggravating factors ("robbery" and

"pecuniary gain") were based on the sole fact that a robbery had occurred with the murder:

> [H]ere, as in all robbery murders, both subsections refer to the same aspect of defendant's crime. Consequently, one who commits a capital crime in the course of a robbery will always begin with two aggravating circumstances against him while those who commit such a crime in the course of any other enumerated felony will not be similarly disadvantaged. . . . [W]e believe that Provence's pecuniary motive at the time of the murder constitutes only one factor which we must consider in this case.

Id. at 786. See Vaught v. State, 410 So. 2d 147 (Fla. 1982); Francois v. State, 407 So. 2d 885 (Fla. 1981).

In Cook v. State, 369 So. 2d 1251 (Ala. 1978), the Alabama Supreme Court held that it was error to apply both "pecuniary gain" and "robbery" as aggravating factors in a robbery-murder, since to do so "in effect condemn[s] Cook twice for the same culpable act--stealing money." 369 So. 2d at 1256.

North Carolina has permitted the "pecuniary gain" -- but not the robbery -- circumstance to be found from the fact of armed robbery. See, e.g., State v. Oliver, 302 N.C. 28, 274 S.E.2d 183 (1981). Specifically, North Carolina has prevented the type of "doubling up" at issue here by holding that, in felony murder cases, proof of the underlying felony ("robbery") may not support an aggravating circumstance. State v. Cherry, 298 N.C. 86, ___, 257 S.E.2d 551, 567 (1979), cert. denied, 446 U.S. 941 (1980):

> [T]his circumstance would be supported by the evidence in a felony murder conviction since the felony murder, by definition, must have occurred during the commission or attempted commission of one of the enumerated felonies. The problem here presented arises because this circumstance is inherent in, and a necessary element of, the capital felony, to wit, felony murder. . . .
>
> A defendant convicted of a felony murder . . . will have one aggravating circumstance "pending" for no other reason other than the nature of the conviction.

> On the other hand, a defendant convicted of a premeditated and deliberated killing, nothing else appearing, enters the sentencing phase with no strikes against him. This is highly incongruous . . . .

See also Barfield v. Harris, 540 F. Supp. 451, 470 (E.D.N.C. 1982).

Thus, Mississippi's practice permitting such duplication stands in stark contrast to that in other states.[8] The practice achieves constitutional dimension where, as here, the "duplication" has a direct bearing on the procedure by which the defendant is actually selected for the death penalty. The problem is not just that Mississippi condones a "duplication" of aggravating factors, but that the jury's determination of the sentence results directly from the balancing of "duplicative" aggravating factors against non-duplicative mitigating factors. The chances of an unreliable balancing are thereby enhanced. Yet, "the qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." Lockett v. Ohio, 438 U.S. 586, 604 (1978).

c. This issue is properly presented for the Court's review. At trial, appellant objected generally to the State's proposed jury instruction, adopted by the trial judge, that permitted the duplication of "robbery" and "pecuniary gain" as aggravating circumstances. Appellant raised the duplication issue explicitly on motion for new trial and in his appeal to

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8/ In Gray v. Lucas, 677 F.2d 1086, 1104 (5th Cir. 1982), the Fifth Circuit upheld Mississippi's practice, contrary to that of North Carolina, of permitting the "murder in the course of a felony" aggravating factor to be found where the underlying conviction is for felony murder.

The court's reasoning, however, does not apply here. First, unlike any other person convicted of felony murder, the armed robber finds himself facing two aggravating circumstances, not one like other felony murderers. Second, it is difficult to ascertain a legitimate state interest in treating armed robbery felony murders more harshly than, for example, rapist felony murderers.

the Mississippi Supreme Court. Despite the issue of its not having been timely raised below, the Mississippi Court rejected the contention on the merits:

> In cases where we feel that the asserted error has merit and that it unduly prejudiced the appellant, we may raise it as an apparent error on the face of the record on the Court's own motion . . . . However we are not required to do so . . . . In this case, we are not so persuaded and do not so move. This is consistent with prior holdings where the jury verdict was allowed to stand and similar instructions were approved.

435 So. 2d at 650 (citation omitted).[9/] Thus, the Mississippi Court held that the "doubling up" contention of appellant had no merit and did not prejudice appellant, because it was consistent with that court's prior holdings -- that juries in Mississippi may find two aggravating circumstances from the sole occurrence of a robbery. The issue is ripe for review by this Court.

II. A COURTROOM DEMONSTRATION TO ESTABLISH AN UNDEFINED DEATH SENTENCING STANDARD -- THAT A MURDER WAS "ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL" -- RAISES IMPORTANT QUESTIONS CONCERNING THE SCOPE OF THIS COURT'S DECISION IN GODFREY V. GEORGIA.

A third aggravating circumstance supporting petitioner's death sentence was that the murder was "especially heinous, atrocious or cruel." The trial court did not define this term for the jury. It did, however, over petitioner's objection, compel petitioner to demonstrate to the jury his role in the crime, even though it was Tokman who killed the driver.[10/] The Mississippi Supreme Court found the

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9/ The Mississippi Supreme Court has generally refused to adopt a strict procedural bar in death penalty cases. See Hill v. State, 432 So. 2d 427, 444 (Miss. 1983) (dissent of Justice Robertson).

10/ The evidence was undisputed that Tokman stabbed the driver, who died as a result of the stabbing wounds (R. 593, 691). The medical examiner confirmed that death was caused by

(Continued)

demonstration non-prejudicial because it was "relevant to the aggravating circumstance of whether the killing was done in an 'especially heinous, atrocious or cruel manner.'" 435 So. 2d at 654. The reviewing court stated:

> It was within the jury's province to find this aggravating circumstance as instructed by the court and the appellant's demonstration was not prejudicial. Further, we note our recent ruling in Hezekiah Edwards v. State, _ So.2d ____ (Miss. 1983) . . . that the terms "especially heinous, atrocious and cruel," . . . are proper without further definition for a jury and constitutional in light of the plurality opinion in Godfrey v. Georgia, 446 U.S. 420 . . . .

Id. at 655 (citations omitted) (emphasis added).

Briefly put, the compelled demonstration substituted for a definition of a death penalty standard which, undefined, is inherently vague. Indeed, the demonstration contributed to an unprincipled exercise of discretion by the jury, in apparent conflict with the principles of this Court's decision in Godfrey v. Georgia, 446 U.S. 420 (1980). Petitioner was not the "triggerman." The victim died at the hand of the co-defendant, Tokman. Yet, the jury was given an opportunity to see only how petitioner attempted to subdue the driver by holding a rope around his neck, but not how Tokman waved a knife at petitioner beforehand or how Tokman stabbed the victim with the knife. Thus, without showing the jury the killing itself, petitioner's subordinate role became the sole focus of the reenactment. His role was equated with the entire murder. This necessarily was inconsistent with the individualized selection procedure that is constitutionally required under Zant v. Stephens, ___ U.S. at ___, 103 S. Ct. at 2744. The

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(Footnote 10 continued)

internal bleeding and that "[t]he object around the neck did not cause the death" (R. 558-59). Therefore, the Mississippi Supreme Court's emphasis on Fuson's testimony concerning the driver's ability to survive the "jolt to his neck" is misplaced. See 435 So. 2d at 655.

incomplete -- and inaccurate -- reenactment not only exaggerated petitioner's conduct, but directly appealed to undefined preconceptions of what was "especially heinous, atrocious or cruel." Paraphrasing Godfrey, a "person of ordinary sensibility could fairly characterize almost every murder" reenacted in his or her presence as especially heinous, atrocious or cruel. Godfrey, 446 U.S. at 428-29 (plurality opinion).

The vague aggravating circumstance in Godfrey -- that the murder was "outrageously or wantonly vile, horrible and inhuman" -- was the sole basis on which the death sentence in that case was imposed. This is a key aspect to Mississippi's limited reading of Godfrey. In deciding petitioner's appeal, the Mississippi Supreme Court relied on its recent ruling in Edwards v. State, No. 53,800 (Miss. Mar. 16, 1983), where it had limited Godfrey to its peculiar circumstances:

> It is our considered opinion that the average jury in its sound discretion and judgment understand the generally accepted meaning of the words 'especially heinous, atrocious or cruel' and is able to apply these words to different factual situations without further definition of these words.
>
> * * *
>
> In Godfrey, supra, not only was there just one aggravating circumstance submitted to the jury, there is the additional fact that both of the deceased were killed instantly. The crime was committed in the heat of passion, resulting from family difficulties. We find that the plurality opinion in Godfrey does not apply to the case sub judice. Even with this clear situation there were a number of dissenting opinions in Godfrey based on the facts of that particular case.

Id., slip op. at ___.

In short, Mississippi limits Godfrey to situations where (a) an adjectival standard like "vile, horrible or inhuman" is the only aggravating circumstance that a jury is permitted to consider, and (b) where the facts clearly indicate

that the victim did not experience acts other than the murder itself. For this reason, Mississippi has concluded that its statutory phrase "especially heinous, atrocious or cruel" does not require further definition -- except where the special Godfrey facts may exist -- and that, consequently, courtroom reenactments to support such statutory standards pose no constitutional problems.

Without further clarification by this Court, there is a basis for states like Mississippi to take conflicting approaches to Godfrey. On one hand, the majority of the Court in Godfrey -- the four justices who joined the plurality opinion, as well as the two justices who concurred separately -- indicated that death sentences based on adjectival standards like "vile, horrible and inhuman" or "heinous, atrocious or cruel" are vague and may be constitutionally flawed, unless such terms are given objective and limiting application:

> There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility would fairly characterize almost every murder as "outrageously or wantonly vile, horrible and inhuman." Such a view, in fact, has been one to which the members of the jury in this case may have subscribed.

446 U.S. at 428-29 (plurality opinion of Justice Stewart). Cf. State v. Sonnier, 402 So. 2d 650, 653 (La. 1981), where Louisiana found the term "especially heinous, atrocious, or cruel" to be unconstitutionally vague without further definition.

Yet, the plurality opinion suggested that any reviewing court could legitimize application of a vague standard by providing a principled basis to distinguish the case at hand from cases where the death penalty is not imposed:

> Thus, the validity of the petitioner's death sentences turns on whether, in light of the facts and circumstances of the murders that he was convicted of

> committing, the Georgia Supreme Court can be said to have applied a constitutional construction of the phrase "outrageously or wantonly vile, horrible or inhuman . . . ." We conclude that the answer must be no.
>
> * * *
>
> . . . There is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not.

446 U.S. at 432-33.

Thus, the plurality opinion in Godfrey appeared to stop short of deciding the question of whether a state, in all cases, had to give explicit definition to an adjectival death penalty standard which, without definition, could be applied to any homicide. Mississippi's narrow reading of Godfrey found such definition not to be required and upheld the courtroom demonstration. Consequently, this case presents a propitious opportunity for this Court to clarify (1) that explicit definition must be given at some stage of a State's sentencing procedure to those adjectival standards capable of being applied to any homicide; and (2) that courtroom demonstrations cannot substitute for such objective definition but, instead, inject further arbitrariness when used to support such a standard.

## III. THIS CASE PRESENTS THE IMPORTANT FEDERAL QUESTION OF WHETHER THE PRINCIPLES OF LOCKETT V. OHIO AND EDDINGS V. OKLAHOMA REQUIRE THE GRANTING OF REQUESTED JURY INSTRUCTIONS THAT A LIFE SENTENCE MAY BE RETURNED NOTWITHSTANDING ANY EXPLICIT AGGRAVATING AND MITIGATING CIRCUMSTANCES FOUND UNDER A STATUTORY PROCEDURE.

This case also presents a seminal question of the scope of Lockett v. Ohio, 438 U.S. 586 (1978), and Eddings v. Oklahoma, 455 U.S. 104 (1982). Lockett directed:

> that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense

> that the defendant proffers as a basis for a sentence less than death.

438 U.S. at 604 (plurality opinion of Chief Justice) (footnotes omitted) (emphasis in original). Eddings held that "[j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law any relevant mitigating evidence." 455 U.S. at 113-114 (emphasis in original).

Lockett and Eddings did not reach the question of whether a defendant is constitutionally entitled to jury instructions that a life sentence may be returned -- despite findings of aggravating circumstances or mitigating circumstances specified by judge or statute -- so long as general mitigating considerations are presented to the jury concerning the defendant's life and character.

a. At the sentencing hearing in this case, the trial judge rejected petitioner's request for the following jury instruction:

> Jury Instruction No. 22
>
> The court instructs the jury that the prosecution carries the burden of showing not only that aggravating circumstances exist but also that they are sufficient enough to warrant death. If the prosecution merely proves the existence of an aggravating circumstance, you are free to find it insufficient to warrant death and are not required to automatically impose death.

The trial judge also rejected petitioner's request for a related instruction, which reads as follows:[11/]

> Jury Instruction No. 25
>
> You are instructed that you need not find any mitigating circumstances in order to return a sentence of life imprisonment.

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11/ The judge granted the latter instruction in the separate sentencing hearing of petitioner's co-defendant, Tokman. See Tokman v. State, 435 So. 2d 664, 668 (Miss. 1983).

Moreover, the judge instructed petitioner's jury that all general mitigating evidence about the defendant's life and character could comprise only a single mitigating circumstance -- to be treated like any individual aggravating or mitigating circumstance under Mississippi's balancing procedure. The jury was to weigh those limited, predetermined mitigating circumstances against specified aggravating circumstances and to return a sentence of death if, after balancing aggravating and mitigating factors, it found, "that the aggravating circumstances out-weigh the mitigating circumstances and the death penalty should be imposed" (emphasis added). App. at 43a. As noted in point I of this petition, the entire selection procedure under the Mississippi statute is based on a balancing of predetermined considerations.

The refusal to grant requested instructions 22 and 25 prevented the jury from using its assessment of general mitigating evidence -- demeanor and character evidence -- as an independent basis for returning a life sentence. It created the clear risk that the protections afforded by Lockett and Eddings would become mere rituals or procedural formalities. See Chenault v. Stynchcombe, 581 F.2d 444, 448 (5th Cir. 1978) (Lockett "mandates that the judge clearly instruct the jury about mitigating circumstances and the option to recommend against death"); cf. Goodwin v. Balkcom, 684 F.2d 794, 801-02 (11th Cir. 1982), cert. denied, ___ U.S. ___, 103 S. Ct. 1798 (1983) ("Capital sentencing instructions which do not clearly guide a jury in its understanding of mitigating circumstances and their purpose, and the option to recommend a life sentence although aggravating circumstances are found, violate the eighth and fourteenth amendments"); Spivey v. Zant, 661 F.2d 464, 471 (5th Cir. 1981), cert. denied, ___ U.S. ___, 102 S. Ct.

3495 (1982) (judge should explain the function of mitigating circumstances to the jury).

This case, therefore, presents the Court with an appropriate opportunity to define the scope of Lockett and Eddings -- whether, in addition to introducing any general mitigating considerations, a defendant is entitled to a jury instruction that his life may be spared solely on the basis of general mitigating considerations; or, conversely, whether a state may confine sentencing juries to explicit factors predetermined by judge and statute.

Only Justice Robertson's dissent addressed this issue below -- that a life sentence does not have to depend on the statutory balancing process alone. The issue was, however, sufficiently preserved. When some members of a reviewing court expressly consider a point on appeal, this Court presumes that the entire Court has passed on the question. Gardner v. Florida, 430 U.S. 349, 361 (1977).

b. States other than Mississippi have considered this issue,[12/] and the results have been divergent. Courts in

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12/ Although the trial judge in this case refused to give instructions that would have permitted the jury to return a life sentence even if specified aggravating circumstances outweighed specified mitigating circumstances, the Mississippi Supreme Court has taken a conflicting position in an earlier case. See Coleman v. State, 378 So. 2d 640, 646 (Miss. 1979) (Mississippi statute allows juries to return a life sentence when aggravating circumstances exist in the absence of mitigating circumstances and juries may refuse to impose the death penalty if they find existing aggravating circumstances insufficient to warrant death). Relying on Coleman, the Fifth Circuit has interpreted Mississippi law as permitting a jury to impose a life sentence even when aggravating circumstances outweigh mitigating circumstances. Gray v. Lucas, 677 F.2d 1086, 1106 (5th Cir. 1982).

North Carolina,[13] Oklahoma,[14] and Tennessee[15] have held that the judge should instruct the jury to return a life sentence only when mitigating circumstances are found to outweigh aggravating circumstances. By contrast, the predominance of aggravating circumstances does not preclude a jury from refusing to impose the death penalty upon defendants in Missouri.[16] Juries in Georgia[17] and Florida[18] may recommend life sentences even when no mitigating circumstances are present.

Accordingly, the Eighth Amendment protections afforded under Lockett and Eddings have not had uniform national application. Defendants in the latter group of states (Missouri, Georgia and Florida) ostensibly benefit from the full thrust of those protections. Thus, any general mitigating evidence they introduce may tip the balance in favor of a life sentence. Defendants in the former group of states undoubtedly find the Lockett protections more attenuated. General mitigating evidence does not fit within the statutory scheme;

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13/ State v. Williams, 305 N.C. 656, 292 S.E.2d 243, cert. denied, ___ U.S. ___, 103 S. Ct. 474 (1982); State v. Pinch, 306 N.C. 1, 292 S.E.2d 203, cert. denied, ___ U.S. ___, 103 S. Ct. 474 (1982); State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979).

14/ Burrows v. State, 640 P.2d 533 (Okla. Crim. App. 1982), cert. denied, ___ U.S. ___, 103 S. Ct. 1250 (1983); Irvin v. State, 617 P.2d 588 (Okla. Crim. App. 1980).

15/ State v. Melson, 638 S.W.2d 342 (Tenn. 1982).

16/ See Bullington v. Missouri, 451 U.S. 430, 434-35 (1981) (noting that Missouri juries are instructed that they are not compelled to impose the death penalty even when aggravating circumstances are not outweighed by mitigating circumstances).

17/ Collier v. State, 244 Ga. 553, ___, 261 S.E.2d 364, 376 (1979). See also Gregg v. Georgia, 428 U.S. 153, 197 (1976) (Georgia jury not required to find any mitigating circumstances to make binding recommendation of mercy). The Georgia Supreme Court has emphasized that sentencing instructions must make clear to juries that they have the option to return a life sentence even if aggravating circumstances are present. E.g., Holton v. State, 243 Ga. 312, 253 S.E.2d 736, cert. denied, 444 U.S. 925 (1979); Spraggins v. State, 240 Ga. 759, 243 S.E.2d 20 (1978); Fleming v. State, 240 Ga. 142, 240 S.E.2d 37 (1977).

18/ See Williams v. State, 386 So. 2d 538 (Fla. 1980).

yet, only jury instructions directed at such evidence can give those principles maximum effect. Unless the principles of Lockett and Eddings are to be applied inconsistently, certiorari should be granted to resolve how those principles apply to jury instructions.

## IV. A STATUTORILY-REQUIRED PROPORTIONALITY REVIEW WITHOUT ARTICULATED OR APPLIED OBJECTIVE CRITERIA RAISES A FUNDAMENTAL CONSTITUTIONAL QUESTION CONCERNING THE ADMINISTRATION OF DEATH SENTENCING STATUTES

Last term, this Court granted certiorari in a case that presents the issue of whether a proportionality review of a death sentence is constitutionally required. Pulley v. Harris, 692 F.2d 1189 (9th Cir. 1982), cert. granted, ___ U.S. ___, 103 S. Ct. 1425 (1983). This case presents a related issue not presented in the Pulley case[19] -- whether Mississippi's procedure for conducting a statutorily-required review of the proportionality of death sentences is constitutional under the Eighth and Fourteenth Amendments, when no objective criteria are applied in the review.[20] Petitioner below claimed his sentence was excessive and disproportionate.

This Court, in upholding the constitutionality of other state death penalty statutes, has repeatedly stated that meaningful appellate review of a death sentence is an integral

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19/ In Pulley, the California Supreme Court did not perform a proportionality review; therefore, the question of the constitutional scope of such a review is not properly presented in that case.

20/ Although this Court has not yet determined whether proportionality review is required by the Eighth Amendment, once a state provides for such review "due process protections are necessary to ensure that the state-created right is not arbitrarily abrogated." Vitek v. Jones, 445 U.S. 480, 488-89 (1980). See also Barclay v. Florida, ___ U.S. ___, 103 S. Ct. 3418, 3428 (1983) (Stevens, J., concurring) (recurring theme in court's death penalty cases is emphasis on procedural protections that are intended to ensure that the death penalty is imposed in a consistent and rational manner).

part of those death penalty schemes. See Zant v. Stephens, ___ U.S. at ___, 103 S. Ct. at 2745; Barclay v. Florida, ___ U.S. at ___, 103 S. Ct. at 3428 (1983) (plurality opinion of Justice Rehnquist); Gregg v. Georgia, 428 U.S. 153, 166-68, 195, 198, 204-07 (1976) (opinion of Justice Stewart); id. at 211-12, 222-24 (White, J., concurring); Proffitt v. Florida, 428 U.S. 242, 250-51, 253, 258-60 (1976) (opinion of Justice Stewart).

The Mississippi death penalty statute, as well as those in a number of other states,[21] requires the state court to review the proportionality of every death sentence. Under Miss. Code Ann. § 99-19-105(1) (Supp. 1982), the Mississippi Supreme Court has the duty to conduct an independent review of the appropriateness of a death sentence. This review is in addition to the right of direct appeal. Id. § 99-19-105(6). The Mississippi Supreme Court must separately determine "[w]hether the sentence of death is excessive or dispro-

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21/ See, e.g., Ala. Code § 13A-5-53(b)(3) (1982); Conn. Gen. Stat. Ann. § 53a-46b(3) (West Cum. Supp. 1983); Del. Code Ann. tit. 11, § 4209(g)(2)(a) (1979); Ga. Code. Ann. § 17-10-35(c)(3) (1982); Idaho Code Ann. § 19-2827(c)(3) (1979); Ky. Rev. Stat. Ann. § 532.075(3)(c) (Michie Supp. 1982); La. Code Crim. Proc. Ann. art. 905.9.1(1)(c) (West Supp. 1983); La. Sup. Ct. R. 28(1)(c) (West 1983); Md. Ann. Code art. 27, § 414(e)(4) (1982); Miss. Code Ann. § 99-19-105(3)(c) (Supp. 1982); Mo. Ann. Stat. § 565.014.3 (Vernon 1979); Mont. Code. Ann. § 46-18-310(3) (1981); Neb. Rev. Stat. § 29-2521.03 (1979) (review of sentences in all cases involving criminal homicide); Nev. Rev. Stat. § 177.055(2)(d) (1979); N.H. Rev. Stat. Ann. § 630.5 (VII)(c) (Supp. 1981); N.J. Stat. Ann. § 2C:11-3(e) (1982); N.M. Stat. Ann. § 31-20A-4(C)(4) (Supp. 1981); N.C. Gen. Stat. § 15A-2000(d)(2) (1978); Okla. Stat. Ann. tit. 21, § 701.13(c)(3) (1983); 18 Pa. Cons. Stat. Ann. tit. 42, § 9711(h)(3)(iii) (Purdon 1982); S.C. Code Ann. § 16-3-25(C)(3) (Law. Co-op. Supp. 1982); Tenn. Code Ann. § 32-2406(c)(4) (Supp. 1980); Va. Code § 17-110.1(C)(2) (Supp. 1983); Wash. Rev. Code Ann. § 10.94.030(3)(b) (West 1980); Wyo. Stat. § 6-4-103(d)(iii) (1977); cf. Neb. Rev. Stat. § 29-2522(3) (1979) (one factor which judge or judges must consider prior to imposing sentence).

portionate to the penalty imposed in similar cases, considering both the crime and the defendant." Id. § 99-19-105(3)(c).[22/]

State courts have employed various methods to determine which cases within its jurisdiction are "similar." For example, the Georgia Supreme Court has devised several categories of factually similar murder cases: robbery-murders; execution-style murders; domestic-murders; and simultaneous murders. See Dix, Appellate Review of the Decision to Impose Death, 68 Geo. L.J. 97, 113 (1979). Another method is to select cases involving similar aggravating circumstances or a similar combination of aggravating and mitigating circumstances to assess the overall culpability of the defendant. See generally, Baldus, Pulaski, Woodworth, and Kyle, Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach, 33 Stan. L. Rev. 1, 22-52 (1980). Regardless of the method employed, the selection of some objective criteria of comparability is necessary to ensure that evenhanded sentencing is achieved.

The Mississippi Supreme Court, by contrast, has not identified any criteria for selecting "similar" cases.[23/] The

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22/ The statute also requires the court to determine:

> (a) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; and
>
> (b) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 99-19-101.

Miss. Code Ann. § 99-19-105(3)(a)(b) (Supp. 1982).

23/ Other states, such as North Carolina, have failed to formulate procedures by which to implement their statutorily-required duty to compare the proportionality of death sentences with "similar cases". See State v. Brown, 306 N.C. 151, ___, 293 S.E.2d 569, 590-91 (1982)(court has not stated what group of cases it looks to for its comparisons); State v. Pinch, 301 N.C. 1, 292 S.E.2d 203 (dissent), cert denied, ___ U.S. ___, 103 S. Ct. 474 (1982) (court should advise the bar of "the manner in which it conducts its review").

Court, in this case for example, merely reiterated a summary paragraph which appears with slight variations in its last six death penalty decisions:[24/]

> We have reviewed the record and compared it with all of our decisions subsequent to Jackson v. State, 337 So.2d 1242 (Miss. 1976) involving the death penalty. Some have been affirmed and some reversed. After such comparision, we conclude that the death penalty here is not excessive in the light of the aggravating and mitigating circumstances. We further find that the infliction of the death penalty on Michael Dale Leatherwood is not disproportionate, wanton or freakish when compared to cases involving similar crimes, the facts surrounding them and the defendants.

435 So. 2d at 656.

The Mississippi Supreme Court conducted its proportionality review of petitioner's death sentence simply by listing all post-1977[25/] death penalty cases. The court did not indicate what cases, if any, were similar to petitioner's case. Nor did the court discuss the facts of any particular case (i.e., robbery, kidnapping, domestic). Its ostensible proportionality review has been so limited in every death penalty case affirmed since mid-1980.[26/]

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24/ In King v. State, 421 So. 2d 1009, 1019 (Miss. 1982), this paragraph appears verbatim except that the Court conducted a "meticulous" review of the record.

25/ In 1977, Mississippi enacted the present death penalty statute.

26/ Since 1977, the Court has vacated two of twenty sentences. Compare Barclay v. Florida, ___ U.S. ___, 103 S. Ct 3418, 3428 (1983) (Stevens, J., concurring) (since 1972, the Supreme Court of Florida has reviewed 212 death sentences and affirmed only 120 sentences).

In only one decision, Coleman v. State, 378 So. 2d 640 (1978), did the Court vacate a death sentence because it was disproportionate or excessive. In the second case, Edwards v. State, No. 53,800 (Miss. Mar. 16, 1983), in a per curiam opinion, the Court vacated a death sentence because the jury should have been instructed peremptorily that the facts established the two statutory circumstances regarding the defendant's extreme emotional disturbance and his substantially impaired capacity to appreciate the criminality of his conduct.

Indeed, the Mississippi Supreme Court, with one exception, has not even discussed the trial court's findings in any of its post-1977 death penalty decisions.[27] Here, for example, the trial judge's sentencing report below noted substantial evidence supporting at least three statutory mitigating circumstances[28] -- the age of the defendant; the absence of prior criminal activity; and that the defendant acted under the substantial domination of another person, Tokman. App. at 26a. The trial judge's report also stated that petitioner exhibited a "genuine feeling of remorse." App at 24a.

An analysis of the twenty death penalty cases enumerated by that Court, moreover, reveals that no defendant sentenced to death in Mississippi presented evidence to establish three statutory mitigating factors.[29] Appendix 8, at App. 54a. None were like petitioner who was eighteen years old and had a prior spotless record.[30] Indeed, fourteen of twenty defendants who have received the death penalty in Mississippi had committed prior criminal acts. Finally, only two of the

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27/ See Jones v. State, 381 So. 2d 983 (Miss. 1980), where the dissent criticized the court's failure to consider the trial judge's findings on the defendant's mental capacity.

28/ In addition, in reference to another statutory mitigating circumstance regarding extreme mental or emotional disturbance, the report noted that "[a]t the time of the offense, the testimony established that the Defendant and the others had not slept for almost 40 hours" (R. 885).

29/ Although one defendant offered evidence arguably to support three mitigating circumstances (age, minor role in crime and substantial impairment of capacity), there was conflicting evidence that defendant was in fact the trigger-man. Moreover, the defendant had previously been convicted of five felonies and showed no remorse. See Bell v. State, 360 So. 2d 1206 (Miss. 1978).

30/ Only one Mississippi defendant was of similar age (19) and had no history of prior criminal activity. However, the defendant had actually committed the murder, showed no remorse and did not offer character evidence. See Johnson v. State, 416 So. 2d 383 (Miss. 1982).

death-sentenced defendants were "non-triggerman".[31] In both cases, the death sentences were vacated in light of this Court's decision in Enmund v. Florida, ___ U.S. ____, 102 S. Ct. 3368 (1982), leaving petitioner as the only non-triggerman sentenced to death in Mississippi.[32]

The Mississippi court's failure to articulate standards for conducting its proportionality review of similar cases is particularly troubling because the court excluded from its consideration similar cases where a life sentence was imposed. If a comparison is made only with cases in which the death penalty has been imposed, the sentence under review can never be excessive to sentences imposed in similar cases.[33] This Court, while not previously ruling on the question, has endorsed proportionality reviews of death sentences where the review encompasses similar cases involving life sentences. See Zant v. Stephens, ___ U.S. at ___, 103 S. Ct. at 2744 n.19 (1983); Gregg v. Georgia, 428 U.S. at 198 (1976). See also McCaskill v. State, 344 So. 2d 1276, 1280 (Fla. 1977) (failure to consider life sentences in factually similar cases would render Florida's proportionality review unconstitutional);

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31/ Although the defendant in Bullock v. State, 391 So. 2d 601, 614 (Miss. 1980) cert. denied, 452 U.S. 931 (1981), did not inflict the fatal blow, he actively beat the victim. In another case, Bell v. State, 360 So. 2d 1206 (Miss. 1978), the evidence was unclear whether Bell was actually the triggerman. His death sentence, however, has been vacated because of improper jury instructions. See Bell v. Watkins, 692 F.2d 999 (5th Cir. 1982).

32/ Because "intent" is not a necessary element under the Mississippi capital murder statute, there was no finding by the jury that petitioner "attempted to kill or intended to kill" the driver by using the rope. Thus, petitioner's intent was not given the constitutionally required consideration required by this Court's decision in Enmund v. Florida, ____ U.S. _____, 102 S. Ct. 3368 (1982).

33/ This failure to consider comparable cases involving life sentences appears to be contrary to the Mississippi statute's mandate to consider "whether the sentence of death is excessive or disproportionate to the penalty [not just the death penalty] imposed in similar cases." See Miss Code Ann. § 99-19-105(3)(c) (Supp. 1982) (emphasis added).

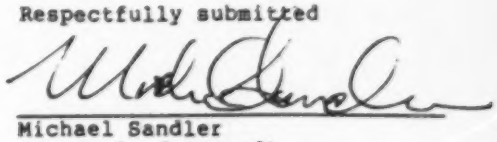
Baldus, Pulaski, Woodworth, and Kyle, Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach, 33 Stan. L. Rev. 1, 2 n.1 (1980) (a review procedure which engages only in seeking death sentence "precedents" that are comparable to the case under review may be constitutionally inadequate).

This case, therefore, presents a situation where a proportionality review was conducted without any objective criteria being articulated by the reviewing court. The review reveals "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." Godfrey v. Georgia, 446 U.S. at 443. The question is thus squarely presented of whether a reviewing court, in cases where a proportionality review is statutorily-required, may exercise complete and unarticulated discretion in how that proportionality review is conducted, or whether some objective criteria must be articulated and applied.

## CONCLUSION

For the foregoing reasons, petitioner requests this Court to grant the petition for Writ of Certiorari to the Supreme Court of the State of Mississippi.

Respectfully submitted



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# APPENDICES

Cite as 435 So.2d 645 (Miss. 1983)

Magebee, Brown, Williams & Mestayer, Raymond L. Brown, Pascagoula, for appellants.

Wiesenburg & Reed, Karl Wiesenburg, Pascagoula, for appellee.

Before WALKER, P.J., and BOWLING and PRATHER, JJ.

AFFIRMED.

Michael Dale LEATHERWOOD

v.

STATE of Mississippi.

No. 53914.

Supreme Court of Mississippi.

May 25, 1983.

Rehearing Denied June 24, 1983 and Aug. 17, 1983.

Defendant pled guilty to capital murder, the Circuit Court, Hinds County, William F. Coleman, J., sentencing him to death, and he appealed. The Supreme Court, Walker, P.J., held that: (1) jury properly considered that murder was committed during commission of robbery as aggravating circumstance; (2) sentencing court properly allowed jury to consider that murder was committed for purpose of avoiding lawful arrest; (3) evidence of two prior convictions were properly admitted; (4) sentence of death was not excessive or disproportionate; (5) trial court properly admitted evidence with regard to crimes for which defendant had not been convicted to rebut his "substantial domination" defense; (6) testimony of discussions between defendant and accomplice wherein they suggested killing third participant in murder was properly admitted; (7) trial court did not err in denying challenge for cause against two veniremen with strong views in favor of death penalty; (8) rope with which defendant strangled victim and demonstration of such strangling were properly admitted; (9) photographs of victim were properly admitted; and (10) institution of death penalty was not impermissible under Eighth and Fourteenth Amendments.

Affirmed.

Hawkins, J., dissented and filed opinion in which Dan M. Lee, J., joined.

Robertson, J., dissented and filed opinion.

Hawkins, J., specially concurred with dissent of Robertson, J., and filed opinion.

1. Criminal Law ⇐1038.1(7)

Where defendant convicted of capital murder did not raise objection that aggravating circumstances that murder was committed for pecuniary gain and that murder was committed during robbery constituted impermissible "doubling up" of aggravating circumstances when trial court gave instructions on aggravating circumstances, but only asserted objection after verdict was in and he had filed motion for new trial, objection was too late to preserve issue. Code 1972, § 99-19-101(5)(d, f).

2. Criminal Law ⇐1134(1)

In cases where Supreme Court feels that asserted error has merit and that it unduly prejudiced appellant, Court may raise it as apparent error on face of record on Court's own motion.

3. Homicide ⇐354

Sentencing court in bifurcated trial did not err in allowing jury to consider, as aggravating circumstance, that murder was committed while defendant was engaged in commission of robbery, notwithstanding that robbery was also element of capital murder to which defendant pled guilty. Code 1972, §§ 97-3-19, 99-19-101(5)(d).

4. Homicide ⇐354

If there is evidence from which it may reasonably be inferred that substantial reason for killing was to conceal identity of

killer or killers or to "cover their tracks" so as to avoid apprehension and arrest, then it is proper for trial court to allow jury to consider aggravating circumstance that murder was committed for purpose of avoiding or preventing lawful arrest. Code 1972, § 99-19-101(5)(e).

5. Homicide ⇐354

Where there was testimony by accomplice that there was discussion between defendant and different accomplice during planning stage of robbery that they would leave no witnesses, sentencing court, in bifurcated murder trial, properly allowed jury to consider as aggravating circumstance that murder was committed for purpose of avoiding or preventing lawful arrest. Code 1972, § 99-19-101(5)(e).

6. Homicide ⇐354

Notwithstanding that other crimes and underlying convictions therefor were subsequent to murder for which defendant was sentenced, sentencing court properly allowed admission of two other convictions to show aggravating circumstance that defendant was previously convicted of another felony involving use or threat of violence to persons, as crimes committed by defendant after having committed capital murder had just as much or more bearing on question of his character, criminal tendencies, and whether he should suffer death penalty, as did crimes committed by him before he committed capital murder. Code 1972, § 99-19-101(5)(b).

7. Homicide ⇐345, 354
Homicide ⇐354

Where there was testimony that defendant and accomplice planned to leave no witnesses to robbery and that during robbery defendant told accomplice to "stab" victim and, moreover, there was ample evidence that defendant was attempting to strangle victim to death with nylon rope when victim was stabbed, sentence of death imposed upon defendant was not excessive or disproportionate, notwithstanding that accomplice delivered actual death blow to victim and different accomplice was allowed to plead manslaughter and received sentence of 20 years.

8. District and Prosecuting Attorneys ⇐8

Prosecutors must be given wide latitude in allowing accomplice to plead to lesser offenses in exchange for their cooperation in prosecution of other participants to crime.

9. Criminal Law ⇐369.2(4)

Where defendant attempted to mitigate his involvement in robbery-murder by showing that he was under "substantial domination" of accomplice, trial court properly allowed State to cross-examine defendant with regard to other crimes for which he had not been convicted for purpose of showing that such crimes were committed in absence and without knowledge of accomplice, thus rebutting "substantial domination" defense. Code 1972, § 99-19-101(6)(e).

10. Criminal Law ⇐986.4(3)

In sentencing portion of bifurcated trial of defendant who pled guilty to capital murder, trial court properly admitted testimony by army buddy of defendant that defendant and accomplice discussed that they would have to kill third participant in murder because "If he gets caught, he will talk," as showing that defendant not only lacked remorse for his participation in murder, but that he was willing to kill again to cover up original slaying.

11. Jury ⇐33(1.4)

Exclusion of citizens under age of 21 years from serving on jury panel considering sentence of defendant who pled guilty to capital murder was proper. Code 1972, § 13-5-1.

12. Jury ⇐106

Where two veniremen who indicated that they had strong views in favor of death penalty further stated that they could put aside personal feelings, follow law and instructions of court, and return verdict based solely upon law and evidence and not vote for death penalty unless evidence warranted it, trial court did not err in refusing to discharge veniremen for cause.

13. Criminal Law ⇐986.5(3)

In sentencing portion of bifurcated trial of defendant who had pled guilty to capital murder, introduction of rope which defendant used to strangle victim and demonstration of how defendant had used rope were not error, as they were relevant to properly consider aggravating circumstance of whether killing was done in "especially heinous, atrocious or cruel manner." Code 1972, § 99-19-101(5), (5)(h).

14. Criminal Law ⇐986.5(3)

Photographs of murder victim were properly admitted in sentencing portion of bifurcated trial of defendant who pled guilty to capital murder as relevant to whether crime was "especially heinous, atrocious or cruel" pursuant to statutory aggravating circumstance. Code 1972, § 99-19-101(5), (5)(h).

15. Constitutional Law ⇐270(1)
Criminal Law ⇐1213.8(9)

Where defendant who pled guilty to capital murder participated in planning of robbery-murder, was present and involved in its execution, attempted to strangle victim with rope, and told accomplice to "stab" victim, sentencing defendant to death was not impermissible under Eighth and Fourteenth Amendments to United States Constitution, notwithstanding that accomplice, and not defendant, delivered what was determined to be fatal blow. U.S.C.A. Const. Amends. 8, 14.

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Wilkins, Ellington & James, Samuel H. Wilkins, James O. Nelson, II, Jackson, for appellant.

Bill Allain, Atty. Gen. by Carolyn B. Mills, Sp. Asst. Atty. Gen., Jackson, for appellee.

En banc.

WALKER, Presiding Justice, for the Court:

This is an appeal from the Circuit Court of the First Judicial District of Hinds County, wherein the appellant, Michael Dale Leatherwood, pled guilty to the capital murder of Albert Taylor and was thereafter sentenced to suffer death upon a jury verdict so finding.

On Friday, August 22, 1980, Jerry Fuson, George Tokman, and the appellant Leatherwood left Fort Polk, Louisiana, for Jackson, Mississippi, in the appellant's car to pick up Fuson's car which had been left in Jackson a week earlier. Fuson agreed to pay all expenses in return for the appellant driving him to Jackson. After they retrieved the car, Fuson revealed that he had only ten dollars for gas money for the two cars to return to Fort Polk, which was insufficient. After being turned away by a military agency for soldiers stranded while on leave, the trio realized that they were in a strange city without enough money for their return trip.

George Tokman devised a scheme to rob a cab driver and Fuson helped plan the details "like a military operation." When the first cab answered the call, Tokman ignored the driver because he felt the driver was too young and strong. After a second call, the unfortunate victim, sixty-five year old Albert Taylor arrived and the trio entered the cab and Tokman gave Taylor an address. When the cab reached the address, Tokman requested the victim to turn off his lights because "he didn't want his parents to know he was coming in late." At this point appellant Leatherwood slipped a rope around the victim's neck in order to subdue him. As the appellant tightened the rope, the victim was either pulled or started crawling over the backseat. An autopsy report later showed that the victim's death was caused by intercranial bleeding suffered from blows to the head. There was conflicting testimony as to whether Leatherwood told Tokman to "stab him." Tokman stabbed the victim three times in the head.

After driving the cab to a darkened alley behind a North Jackson shopping center, the trio robbed the victim of his wallet, two money bags, a flashlight, and a pistol. Later they returned to the scene of the crime

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after discovering that the appellant had left his barricks' keys in the cab.

The trio netted approximately $11.00 in cash from the robbery and left Jackson early Sunday morning. Tokman cut his hand while stabbing the victim, so they stopped at a hospital in Vicksburg for medical treatment. While Tokman was in the emergency room, Leatherwood and Fuson stole a man's wallet after surreptitiously gaining entry to his home and later used the victim's credit card for gas.

Thereafter, Leatherwood and Tokman committed two robberies of Louisiana merchants within the next five days. Leatherwood was subsequently tried and convicted for simple and armed robbery in Louisiana before his Mississippi capital murder trial.[1]

Leatherwood pled guilty to capital murder but, among other things, argued to the sentencing jury, which was impaneled to consider whether he should be sentenced to life imprisonment or suffer death, that he was under the substantial domination[2] of George Tokman at the time of the robbery/murder and should not be executed.

The jury returned the death penalty after deliberating for one and one-half hours and found the following aggravating circumstances in accordance with Mississippi Code Annotated section 99-19-101 (Supp.1982):

(1) The capital murder was committed while the appellant was engaged in the commission of a robbery;

(2) The capital murder was committed for pecuniary gain;

(3) The capital murder was especially heinous, atrocious or cruel; and

(4) The capital murder was for the purpose of avoiding a lawful arrest.

On appeal, the appellant raises eleven assignments of error for this Court's review.

1. George Tokman pled not guilty to the capital murder of Albert Taylor and was convicted and sentenced to death. Jerry Fuson pled guilty to manslaughter with a twenty-year recommendation by the district attorney's office in return for his testimony against Tokman and Leatherwood.

PROPOSITION I.

DID THE LOWER COURT ERR IN ALLOWING THE JURY TO CONSIDER THAT THE CAPITAL OFFENSE WAS COMMITTED WHILE THE APPELLANT WAS ENGAGED IN THE COMMISSION OF A ROBBERY, AND THAT THE CAPITAL OFFENSE WAS COMMITTED FOR PECUNIARY GAIN; IN THAT THIS PRACTICE AMOUNTS TO AN IMPROPER "DOUBLING UP" OF AGGRAVATING CIRCUMSTANCES WHICH LEADS TO AN INCONSISTENT AND UNEVEN-HANDED INFLICTION OF THE DEATH PENALTY?

The State of Mississippi presented evidence of several aggravating circumstances as enumerated in Mississippi Code Annotated section 99-19-101(5) (Supp.1982); including the fact that the capital offense was committed while the appellant was engaged in the commission of a robbery [subsection (d)] and that the capital offense was committed for pecuniary gain [subsection (f)]. The trial court allowed this evidence and through its instructions to the jury specifically allowed the jury to consider those two aggravating circumstances along with others. The jury found these two specific aggravating circumstances along with two others.

Appellant contends that allowing the jury to consider subsections (d) and (f) as two separate aggravating circumstances amount to what has been commonly referred to as "doubling up" or unfairly using these two circumstances as separate circumstances when in fact they both refer to the same aspect of the crime of robbery/murder. He asserts that all defendants accused of robbery/murder start the sentencing proceeding with two aggravating circumstances al-

2. Mississippi Code Annotated section 99-19-101(5)(e) provides as a mitigating circumstance that "The defendant acted under extreme duress or under the substantial domination of another person."

ready on the scales of justice weighing against them, as opposed to other types of felony/murders; and that robbery/murder death penalty sentences are rendered in an inconsistent and uneven-handed manner to those death penalty sentences involving other felony/murders.

The Florida Supreme Court, when confronted with the doubling up problem in robbery/murders said:

> The State argues the existence of two aggravating circumstances, that the murder occurred in the commission of the robbery [subsection (d)] and that the crime was committed for pecuniary gain [subsection (f)]. While we would agree that in some cases, such as where a larceny is committed in the course of a rape-murder, subsections (d) and (f) refer to separate analytical concepts and can validly be considered to constitute two circumstances, here, as in all robbery-murders, both subsections refer to the same aspect of the defendant's crime. Consequently, one who commits a capital crime in the course of a robbery will always begin with two aggravating circumstances against him while those who commit such a crime in the course of any other enumerated felony will not be similarly disadvantaged. Mindful that our decision in death penalty cases must result from more than a simple summing of aggravating and mitigating circumstances, [citation omitted], we believe that Provence's pecuniary motive at the time of the murder constitutes only one factor which we must consider in this case. (*Provence v. State*, 337 So.2d 783, 786 (Fla.1976), cert. denied, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977)).

However, in *Smith v. State*, 419 So.2d 563 (Miss.1982), the same argument was made as is made in the case *sub judice*, without using the phrase "doubling up", there, this Court said:

> Instruction number S-4 allowed the jury to find from the evidence the following aggravating circumstances if any:
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> 1. The capital murder was committed while the defendant was engaged in the commission of robbery;
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> 2. The capital murder was committed for pecuniary gain;
>
> 3. The capital murder was especially heinous, atrocious or cruel.
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> *The defendant's position is that the inclusion of the second enumerated aggravating circumstance*, i.e., that the capital murder was committed for pecuniary gain, *renders the allowance of this instruction reversible error for reason that the same burdened him with "the necessity of overcoming two aggravating circumstances" when he had been "charged with a murder during the course of a single felony."* When the Court along with counsel was considering state's instruction number S-4, the following is excerpted from the record:
>
> BY MR. GREGG:
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> If the Court please, for purposes of the record, I would object to it because I don't think that has been proven beyond a reasonable doubt. I just make that for record purposes.

Obviously the defense objection made a the trial level was not on the same ground here argued, and ordinarily cannot on appeal be ground for reversal upon a different ground from that asserted below. *Daumer v. State*, 381 So.2d 1014 (Miss.1980). Nevertheless, we have specifically upheld the instruction now attacked, and we can find no merit to the present argument. *Voyles v. State*, 362 So.2d 1236 (Miss.1978); *Ball v. State*, 360 So.2d 1206 (Miss.1978). (419 So.2d at 568). (Emphasis added).

[1] Leatherwood did not object to court's instruction 2 at trial when the court was considering the instructions on the ground that it permitted a "doubling up" of aggravating circumstances as now urged. He did not assert the present theory until after the jury verdict was in and he had filed a motion for a new trial.

This came too late. To hold otherwise would allow the trial court to be sandbagged by skillful defense attorneys thus

assuring their client a second trial in the event of a death verdict.

[2] In cases where we feel that the asserted error has merit and that it unduly prejudiced the appellant, we may raise it as an apparent error on the face of the record of the Court's own motion. *Irving v. State*, 361 So.2d 1360, 1363 (Miss.1978). However, we are not required to do so by court rule or under section 99-19-105 (Supp.1982) as claimed by the appellant. In this case we are not so persuaded and do not so move. This is consistent with prior holdings where the jury verdict was allowed to stand and similar instructions were approved. *Smith v. State*, 419 So.2d 563 (Miss.1982); *Voyles v. State*, 362 So.2d 1236 (Miss.1978); and *Bell v. State*, 360 So.2d 1206 (Miss.1978).

PROPOSITION II.

DID THE LOWER COURT ERR IN ALLOWING THE JURY TO CONSIDER THAT THE CAPITAL OFFENSE WAS COMMITTED WHILE THE APPELLANT WAS ENGAGED IN THE COMMISSION OF A ROBBERY, IN THAT THIS PRACTICE IS IMPROPER AND LEADS TO AN INCONSISTENT AND UNEVEN-HANDED INFLICTION OF THE DEATH PENALTY?

[3] The appellant contends that it was improper to allow the jury to consider as an aggravating circumstance, that the capital offense was committed while the defendant was engaged in the commission of a robbery. (Mississippi Code Annotated section 99-19-101(5)(d) (Supp.1982)).

He reasons that since robbery is an element of capital murder, that it should not also be used as an aggravating circumstance as permitted under Mississippi Code Annotated section 97-3-19 (Supp.1982). The appellant suggests that this causes him to begin the sentencing stage with one aggravating circumstance against him and thus starts at a disadvantage rather than with a clean slate. He argues that the weighing process is already stacked against him before he even gets up to offer anything in mitigation; and that this practice brings us precariously close to the old ways of mandatory, arbitrary statutes condemned in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

We do not agree with the appellant's contention. Under our capital murder statute, when an accused is found guilty of capital murder arising out of a robbery, he then becomes *subject* to a jury finding that he should be executed if the jury feels that the facts justify it. However, his execution is not mandated and the jury may properly find that he should be sentenced to life in prison. They may so find whether the defendant puts on any evidence of mitigating circumstances or not. This is a far cry from the old statute which mandated execution upon conviction of a capital offense.

The appellant's argument that he enters into the sentencing phase of the bifurcated trial with one strike against him is correct in one sense—i.e., if he had not been convicted of a capital offense, there would be no need for the sentencing hearing and he would simply be sentenced to serve a life term. This does not mean though that the procedure is unfair or faulty.

At the sentencing hearing appellant may put on evidence of mitigating circumstances of an unlimited nature pursuant to section 99-19-101(6) (Supp.1982) and *Washington v. State*, 361 So.2d 61 (Miss.1978), so as to convince the jury that he should not be executed.

We are of the opinion that this assignment of error has no merit.

PROPOSITION III.

DID THE LOWER COURT ERR IN ALLOWING THE JURY TO CONSIDER THAT THE CAPITAL OFFENSE WAS COMMITTED FOR THE PURPOSE OF AVOIDING A LAWFUL ARREST?

The State of Mississippi contended that the aggravating circumstance enumerated in Mississippi Code Annotated section 99-19-101(5)(e) (Supp.1982), was present in this case. Subsection (5)(e) states:

The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

The appellant now argues that the trial court, through its instructions, erroneously allowed the jury to consider the circumstance. The jury found that specific circumstance to exist.

The appellant maintains that there was no evidentiary basis for the finding of that circumstance and it thus impaired the fair and nonbiased weighing of the aggravating and mitigating circumstances in this case.

Florida, which has the same aggravating circumstance, F.S.A. § 921.141(5)(e) (Supp. 1982), has interpreted it to mean that:

> ... an intent to avoid arrest is not present, at least when the victim is not a law enforcement officer, unless it is clearly shown that the dominant or only motive for the murder was the elimination of witnesses. (*Menendez v. State*, 368 So.2d 1278, 1282 (Fla.1979)).

In *Menendez*, a defendant was convicted and sentenced to death for murdering a jewelry store owner while he was robbing it. The Florida Supreme Court affirmed his murder conviction but vacated his death sentence and remanded the case for resentencing by the trial court. The Florida court based its ruling in part upon the improper finding that the murder was committed for the purpose of avoiding a lawful arrest.

Appellant argues that under the State's theory of the case every murder during a felony could be characterized as an attempt to avoid a lawful arrest thus causing another automatic cumulation of aggravating circumstances which would unfairly influence the weighing process by the jury and cause inconsistent and uneven-handed infliction of the death penalty.

[4] In our opinion, the Florida interpretation is too restrictive. Each case must be decided on its on peculiar fact situation. If there is evidence from which it may be reasonably inferred that a substantial reason for the killing was to conceal the identity of the killer or killers or to "cover their tracks" so as to avoid apprehension and eventual arrest by authorities, then it is proper for the court to allow the jury to consider this aggravating circumstance.

[5] The court properly instructed the jury under the facts of this case in this regard because there was testimony by Fuson that there was a discussion between Tokman and Leatherwood during the planning stage of the robbery that they would leave no witnesses.

Therefore, this assignment is without merit.

## PROPOSITION IV.

DID THE LOWER COURT ERR IN OVERRULING THE APPELLANT'S OBJECTION TO THE ADMISSION OF THE TWO LOUISIANA CONVICTIONS OF THE APPELLANT FOR ARMED ROBBERY AND SIMPLE ROBBERY?

[6] At the sentencing hearing, the State was allowed to introduce, over defense objection, two prior convictions of the appellant for armed robbery and simple robbery from the State of Louisiana. The purpose was to show the existence of an aggravating circumstance—that the defendant was previously convicted of another felony involving the use or threat of violence to the person. Miss.Code Ann. § 99-19-101(5)(b) (Supp.1982).

The appellant maintains that this was improper as the crimes and the underlying convictions therefore, were subsequent to the murder for which the appellant was being sentenced.

This Court has ruled that "previously" means previous "to the time of the trial, so that a conviction between the time the capital offense was committed and the time of trial for it may be admitted into evidence as an aggravating circumstance." *Jones v. State*, 381 So.2d 983, 994 (Miss.1980); *Reddix v. State*, 381 So.2d 999 (Miss.1980). Appellant contends that the opinions in those cases are not clear as to whether the convic-

tion's underlying crime was committed previous to the capital offense, or subsequent to it, and that point is significant. He points out that in the case *sub judice*, the crimes which resulted in the Louisiana convictions occurred *after* the capital offense in Jackson and that prior to the capital offense, the appellant had never been in any serious trouble.

We are not impressed by this argument. Crimes committed by a defendant *after* having committed a capital offense have just as much or more bearing on the question of his character, criminal tendencies, and whether he should suffer the death penalty, as do crimes committed by him *prior* to having committed the capital offense. Therefore, this assignment is without merit.

PROPOSITION V.

WAS THE SENTENCE OF DEATH RETURNED BY THE JURY EXCESSIVE OR DISPROPORTIONATE TO THE PENALTY IMPOSED IN SIMILAR CASES, CONSIDERING BOTH THE CRIME AND THE DEFENDANT, AND WAS PROSECUTORIAL DISCRETION ABUSED, THUS VIOLATING THE APPELLANT'S DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES?

[7] Appellant asserts that "The sentence received . . . here is not only disproportionate and excessive in comparison with his coparticipants, but also in comparison with other cases, including *Culberson* [*v. State*, 379 So.2d 490 (Miss.1979)]. . . . in *Culberson*, Pittman, who was an accomplice yet who did not fire the fatal shot, was permitted to plead guilty to manslaughter for which he received fifteen years. Culberson received the death penalty. Here, Tokman, who inflicted the death blow, received the death penalty, and Fuson, an accomplice was, like Pittman, allowed to plead guilty to manslaughter, and received twenty years. But the appellant, an accomplice who like Pittman did not inflict the death blow, was . . . sentenced to death. This result is obviously disproportionate to and more excessive than the result in *Culberson*."

The appellant overlooks the testimony that Leatherwood and Tokman planned not to leave any witnesses and that during the robbery Leatherwood told Tokman to "stab" Taylor, the cab driver. Moreover, *there is ample evidence* that Leatherwood was attempting to strangle Taylor to death with the nylon rope.

[8] As to the charge of abuse of prosecutorial discretion in that the accomplice Fuson was allowed to plead to manslaughter and receive a sentence of twenty years, we find no abuse of discretion. Prosecutors must be given wide latitude in allowing an accomplice to plead to lesser offenses in exchange for their cooperation in the prosecution of other participants to a crime. *Culberson v. State*, 379 So.2d at 510 (Miss. 1979).

PROPOSITION VI.

DID THE LOWER COURT ERR IN OVERRULING THE OBJECTIONS TO AND SUBSEQUENT MOTIONS FOR MISTRIAL BASED ON THE ADMISSION OF TESTIMONY CONCERNING OTHER CRIMES OF THE APPELLANT FOR WHICH HE HAD NOT BEEN CONVICTED?

[9] The appellant contends that the trial court's overruling his objection to the State's questions on cross-examination of him with regard to crimes for which he had not been convicted was error in that they fail to fall within any of the exceptions enumerated in *Gray v. State*, 351 So.2d 1342, 1345 (Miss.1977). *Gray* outlines the general rule in Mississippi regarding the admission of unindicted crimes against a defendant:

> It is well settled in this state that proof of a crime distinct from that alleged in an indictment is not admissible against an accused. There are certain recognized exceptions to the rule. Proof of another crime is admissible where the offense

charged and that offered to be proved are so connected as to constitute one transaction, where it is necessary to identify the defendant, where it is material to prove motive and there is an apparent relation or connection between the act proposed to be proved and that charged, where the accusation involves a series of criminal acts which must be proved to make out the offense, or where it is necessary to prove scienter or guilty knowledge. *See, Smith v. State*, 223 So.2d 657 (Miss.1969), cert. denied, 397 U.S. 1030, 90 S.Ct. 1274, 25 L.Ed.2d 542 (1970); *Cummings v. State*, 219 So.2d 673 (Miss.1969), cert. den. 897 U.S. 942, 90 S.Ct. 954, 25 L.Ed.2d 122 (1970).

The appellant argues that allowing questions concerning these two crimes committed in Vicksburg (the theft of a man's wallet and the charging of gas on the murder victim's credit cards) after the robbery/murder had been committed in Jackson was error because neither crime established a continuous transaction, motive, a common plan or scheme, the appellant's identity or guilty knowledge. Consequently, the appellant contends they only served to inflame and prejudice the jury.

At trial, the appellant attempted to establish through his own testimony, that he was under the "substantial domination of another person" (Tokman) and this should serve to mitigate his involvement in the robbery/murder of Albert Taylor.[1] Leatherwood testified initially that every crime he was involved with in Mississippi and Louisiana was committed because he was scared into it by George Tokman. The State attempted to rebut Leatherwood's testimony by showing that while Tokman was in the Vicksburg Hospital receiving medical treatment for a knife wound suffered during the robbery/murder, that Leatherwood could have called the police or at least left Tokman in Vicksburg. Instead, Leatherwood and Fuson committed the other two crimes. (Leatherwood and Fuson were never indicted or tried for these crimes). The State contends that this proves Leatherwood's criminal intent and state of mind and rebuts any argument that Leatherwood was under the substantial domination of George Tokman. We have stated in the past that ordinarily, in a criminal prosecution, evidence of offenses other than charged in the indictment are not admissible. However, there are exceptions to this rule, such as when the defendant opens the door or otherwise invites the State's reference to the crimes as was done in the case *sub judice*.

We are of the opinion that the appellant opened the door and invited reference to the Vicksburg crimes by his testimony during the sentencing hearing to the effect that he was substantially dominated by Tokman and that this fact should be considered in mitigation by the jury. Appellant admitted on cross-examination that the two Vicksburg crimes for which he was never convicted were committed by Fuson and himself while Tokman was being treated at the Vicksburg Hospital and perpetrated without Tokman's knowledge. It was therefore proper during the sentencing hearing for the State to cross-examine the appellant Leatherwood with reference to the two occasions for the purpose of rebutting Leatherwood's claim, and the court did not err in overruling appellant's objections to the questions with reference to them.

[10] Secondly, the appellant argues that a mistrial should have been granted because Jeffrey Booth, an army buddy of the appellant's, testified that Leatherwood and Tokman discussed that they would have to kill Fuson because "If he gets caught, he will talk." The appellant contends that the above mentioned statement suggests a conspiracy to commit murder which is a separate offense and therefore inadmissible because it could only serve to prejudice and inflame the jury. In our opinion this testimony was admissible for the purpose of showing that Leatherwood not only lacked

1. Mississippi Code Annotated section 99-19-101(6)(e) (Supp.1982) states that the defendant acted under extreme duress or under the substantial domination of another person.

remorse [4] for his participation in the killing of the cab driver but that he was willing to kill again for the purpose of covering up the original slaying. The jury had the right to consider this evidence in deciding his punishment and the court did not err in its admission into evidence.

PROPOSITION VII.

DID THE LOWER COURT ERR IN DENYING THE APPELLANT'S MOTION TO QUASH THE JURY PANEL ON THE GROUNDS THAT MISSISSIPPI STATUTORY LAW SYSTEMATICALLY EXCLUDES FROM THE VENIRE THOSE REGISTERED VOTERS BETWEEN THE AGES OF EIGHTEEN (18) AND TWENTY (20) YEARS OLD INCLUSIVE?

[11] This assignment of error is without merit. Mississippi Code Annotated section 13–5–1 (1972) which excludes citizens under the age of twenty-one years has been upheld in *Joyce v. State*, 327 So.2d 255 (Miss. 1976) and *Johnson v. State*, 260 So.2d 436 (Miss.1972).

PROPOSITION VIII.

DID THE LOWER COURT ERR IN DENYING THE APPELLANT'S CHALLENGE FOR CAUSE AGAINST TWO VENIREMEN ON THE GROUNDS THAT THEY FAVORED THE DEATH PENALTY?

[12] The two veniremen, Robert Nations and Mary Garrett, indicated that they had strong views in favor of the death penalty. After the court overruled appellant's challenge to the jurors, appellant used two of his peremptory challenges to strike them.

We have carefully considered the questions propounded to and responses of Nations and Garrett and are of the opinion that the trial court's ruling was in full compliance with *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). When questioned by counsel both jurors said that they could put aside their personal feelings, follow the law and instructions of the court and return a verdict based solely upon the law and the evidence and not vote for the death penalty unless the evidence warranted it.

PROPOSITION IX.

DID THE LOWER COURT ERR IN ADMITTING THE ROPE OFFERED BY THE STATE, OVER THE OBJECTION OF APPELLANT'S COUNSEL AND IN ALLOWING THE ROPE DEMONSTRATION WITH THE APPELLANT?

[13] The appellant notes that under *Coleman v. State*, 378 So.2d 640 (Miss.1979), the State is limited to presenting evidence during the sentencing phase which is relevant to one or more of the eight enumerated aggravating circumstances outlined in Mississippi Code Annotated section 99–19–101(5) (Supp.1982). Consequently, the appellant fails to see how the admission of the rope into evidence could be relevant to any of the eight aggravating circumstances. The appellant also argues that the State's in-court demonstration by the appellant showing the jury how he used the rope to subdue the driver, was calculated solely for the purpose of prejudicing and inflaming the jury.

We do not agree with the appellant's application of the law as announced in *Culberson* to the facts of this case. Jerry Fuson testified that Exhibit 12 (rope) was *the rope* that Mike Leatherwood used to "strangle" the cab driver; thus, its admission into evidence was not only proper, but relevant to the manner in which the robbery occurred.

In our opinion the demonstration before the jury of the appellant's use of the rope was relevant to the question of whether the killing was done in an "especially heinous, atrocious or cruel manner." Jerry Fuson testified that Leatherwood "threw the rope around his neck and jerked him up and halfway over into the backseat" and held the rope around the victim's neck for sever-

4. Leatherwood testified that he felt remorse from the day the killing occurred.

al minutes. Fuson also testified that the victim still had a pulse, but Leatherwood held the rope tight declaring that nobody could have lived through having that kind of jolt to his neck. It was within the jury's province to find this aggravating circumstance as instructed by the court and the appellant's demonstration was not prejudicial. Further, we note our recent ruling in *Hezekiah Edwards v. State*, — So.2d — (Miss.1983) (No. 53,800, decided 1983), that the terms "especially heinous, atrocious and cruel," Mississippi Code Annotated section 99–19–101(5)(h) (Supp.1982), are proper without further definition for a jury and constitutional in light of the plurality opinion in *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). *See also Washington v. State*, 361 So.2d 61 (Miss. 1978).

PROPOSITION X.

DID THE LOWER COURT ERR IN ADMITTING CERTAIN PHOTOGRAPHS OFFERED BY THE STATE OVER THE OBJECTIONS OF THE APPELLANT'S COUNSEL?

[14] The appellant again relies on *Coleman* to show the limitations of presenting evidence during the sentencing phase which must be relevant to one of the eight aggravating circumstances of Mississippi Code Annotated section 99–19–101(5) (Supp. 1982). The appellant contends that since he pled guilty to the robbery/murder that any of the pictures of the victim are cumulative and prejudicial because the victim's death is not in question.

We have repeatedly held that the competency, relevancy and materiality of photographs are solely within the discretion of the trial judge who will determine their evidentiary purpose and value. *See Bullock v. State*, 391 So.2d 601 (Miss.1981); *Reddix v. State*, 381 So.2d 999 (Miss.1980); *Voyles v. State*, 362 So.2d 1236 (Miss.1978).

We note especially our rule in *Coleman*, 378 So.2d at 648–49 (*Coleman* was affirmed on the guilt phase but reversed and remanded for a life sentence) where we stated on this same question:

> The two pictures complained of were color photographs showing where the shotgun pellets hit the victim on the right side of his head, his lower right arm, and on the left side of his chest.
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> The trial court's ruling was that the state was entitled to introduce these two pictures to support its burden of proving that the offense was "especially heinous, atrocious or cruel." The trial court also granted a jury instruction, over defense objections, that the jury could consider the aggravating circumstance that the offense was especially heinous, atrocious or cruel.
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> The admission of the two pictures on this basis was not error, as they had some probative value along this line of reasoning.

We find that the pictures were relevant as to whether the crime was "especially heinous, atrocious or cruel" and whether the murder was committed during the course of an armed robbery. There is no merit in the appellant's argument.

PROPOSITION XI.

IS THE IMPOSITION OF THE DEATH PENALTY IN THIS CASE, UPON ONE WHO NEITHER TOOK LIFE, ATTEMPTED TO TAKE LIFE, NOR INTENDED TO TAKE LIFE, INCONSISTENT AND IMPERMISSIBLE UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

[15] The appellant's last assignment of error is based on the argument that the rendering of the death penalty for a murder he did not commit nor attempt to commit, nor intended to commit, is inconsistent with the Eighth and Fourteenth Amendments of the United States Constitution. The appellant's argument is based on the recent United States Supreme Court decision of *Enmund v. Florida*, — U.S. —, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) wherein the Court held that the death penalty may not

be imposed upon a "non-triggerman" *unless* there is proof that the defendant killed, attempted to kill, or intended to kill the victim. In *Enmund*, the Court reversed a decision of the Florida Supreme Court which upheld the death penalty for Enmund who had been indicted for the first degree murder and robbery of an elderly couple who were known to carry large amounts of cash.

The Florida Supreme Court and the United States Supreme Court each recounted slightly differing versions of the facts with the central difference being outlined in a footnote to the opinion:

> The Florida Supreme Court's understanding of the evidence differed sharply from that of the trial court with respect to the degree of Enmund's participation. In its sentencing findings, the trial court concluded that Enmund was a major participant in the robbery because he planned the robbery in advance and himself shot the Kerseys. [*Enmund v. State*] 399 So.2d, [1362] at 1372. Both of these findings, as we understand it, were rejected by the Florida Supreme Court's holding that the only supportable inference with respect to Enmund's participation was that he drove the getaway car. The dissent, while conceding that this holding negated the finding that Enmund was one of the triggermen, argues that the trial court's finding that Enmund planned the robbery was implicitly affirmed. *Post*, at [3374]. As we have said, we disagree with that view. In any event, the question is irrelevant to the constitutional issue before us, since the Florida Supreme Court held that driving the escape car was enough to warrant conviction and the death penalty, whether or not Enmund intended that life be taken or anticipated that lethal force would be used. (—— U.S. at —— n. 2, 102 S.Ct. at 3371 n. 2, 73 L.Ed.2d at 1145 n. 2 (1982)).

However, we find that the case *sub judice* does not fall within the holding of *Enmund*. Enmund did not participate in the actual robbery nor was he present when the murder was committed—he was waiting in the getaway car. Michael Leatherwood, like Enmund, participated in the planning of the crime. The difference is that Leatherwood was also present and involved in the execution of the robbery/murder of Albert Taylor by throwing a rope over his head and pulling it tight with such force that the victim was jerked into the backseat. Leatherwood held the rope tight and told Tokman to "stab him" even as the victim was being subdued.

Though Leatherwood testified he never believed the robbery would be carried out and certainly never intended to kill the victim, this Court cannot believe that one who attempts to strangle his victim into submission to the point of unconsciousness and tells his accomplice to "stab him" does not intend to or attempt to kill. The appellant's actions spoke louder than his words.

Though Michael Leatherwood was not the "triggerman", he planned, schemed, and ultimately physically subdued the victim by choking him with a rope, while another stabbed and bludgeoned the victim to death. These are hardly the facts upon which *Enmund* was decided by the United States Supreme Court and thus we find that the appellant's argument is not persuasive, and we find no merit in this assignment of error.

We have reviewed the record and compared it with all of our decisions subsequent to *Jackson v. State*, 337 So.2d 1242 (Miss. 1976) involving the death penalty. Some have been affirmed and some reversed. After such comparison, we conclude that the death penalty here is not excessive in the light of the aggravating and mitigating circumstances. We further find that the infliction of the death penalty on Michael Dale Leatherwood is not disproportionate, wanton or freakish when compared to cases involving similar crimes, the facts surrounding them and the defendants.

We also find that the sentence of death was not imposed under the influence of passion, prejudice or any other arbitrary factors, and, that the evidence overwhelmingly supports the jury's finding of statuto-

ry circumstances in that the capital murder was committed while the defendant was engaged in the commission of the crime of robbery, that the defendant committed the capital murder in an especially heinous, atrocious and cruel manner. The capital murder was committed for pecuniary gain and was committed for the purpose of avoiding a lawful arrest. The execution of Leatherwood will be consistent and even-handed in the light of all post *Jackson* death penalty cases considered by this Court.[1]

The judgment of the lower court is affirmed and Wednesday, July 13, 1983, is set as the date for execution of the sentence and infliction of the death penalty in the manner provided by law.

WALKER, P.J., PATTERSON, C.J., BROOM, P.J., and ROY NOBLE LEE, BOWLING and PRATHER, JJ., concur.

HAWKINS and DAN M. LEE, JJ., dissent.

ROBERTSON, J., dissents.

HAWKINS, J., specially concurring to Justice ROBERTSON'S dissent.

APPENDIX "A"

DEATH CASES AFFIRMED BY THIS COURT:

*Pruett* v. *State*, 431 So.2d 1101 (Miss. 1983) (No. 54,000, handed down February 23, 1983).

*Gilliard* v. *State*, 428 So.2d 576 (Miss. 1983).

*Evans* v. *State*, 422 So.2d 737 (Miss.1982).

*King* v. *State*, 421 So.2d 1009 (Miss.1982).

*Wheat* v. *State*, 420 So.2d 229 (Miss.1982).

*Smith* v. *State*, 419 So.2d 563 (Miss.1982).

*Edwards* v. *State*, 413 So.2d 1007 (Miss. 1982).

*Johnson* v. *State*, 416 So.2d 383 (Miss. 1982).

*Bullock* v. *State*, 391 So.2d 601 (Miss. 1980).

*Reddix* v. *State*, 381 So.2d 999 (Miss. 1980).

*Jones* v. *State*, 381 So.2d 983 (Miss.1980).

*Culberson* v. *State*, 379 So.2d 499 (Miss. 1979).

*Gray* v. *State*, 375 So.2d 994 (Miss.1979).

*Jordan* v. *State*, 365 So.2d 1198 (Miss. 1978).

*Voyles* v. *State*, 362 So.2d 1236 (Miss. 1978).

*Irving* v. *State*, 361 So.2d 1360 (Miss. 1978).

*Washington* v. *State*, 361 So.2d 61 (Miss. 1978).

*Bell* v. *State*, 360 So.2d 1206 (Miss.1978).

DEATH CASES REVERSED AS TO PUNISHMENT AND REMANDED FOR RESENTENCING TO LIFE IMPRISONMENT:

*Hezekiah Edwards* v. *State*, — So.2d —— (Miss.1983) (No. 53,800, handed down March 16, 1983).

*Coleman* v. *State*, 378 So.2d 640 (Miss. 1979).

HAWKINS, Justice, dissenting:

In the circuit court Michael Dale Leatherwood pled guilty to capital murder. The only issue before the trial jury was whether he would be sentenced to life imprisonment or death.

This is the only issue before us.

The Legislature has not only authorized, but has also made it our responsibility to "*consider the punishment* as well as any errors enumerated by way of appeal" in a death penalty case. This "*sentence review shall be in addition* to direct appeal." Upon such review this Court is given the authority, aside from any trial court errors or even in the absence of error, to either affirm the sentence, or remand the case to the circuit court for sentence to life imprisonment. Miss.Code Ann. § 99-19-105 (Supp.1982).

This narrow discretion granted us is as powerful as it is unusual. The Legislature has said: The Mississippi Supreme Court, as well as the trial jury, is given the discretion of determining whether the accused should

1. See Appendix "A".

be put to death or sentenced to life imprisonment.

The constitutionality of this extraordinary appellate review is not challenged. Our sole function is to determine its application.

I do not propose to denigrate this awesome responsibility by ignoring the authority given us to set aside the death sentence when I am convinced the case warrants setting the death sentence aside, any more than I propose to abuse the authority by reckless utilization.[1]

It is through this narrow aperture that I propose to view this case.

Michael Dale Leatherwood was born February 16, 1962. As far as the record reveals, his life was essentially uneventful until the crime of August 24, 1980, and the series of crimes for four days following. We might note his mother testified he was born out of wedlock, and as a baby she gave him to his father and his wife at the time for adoption. The adoptive mother died soon thereafter of cancer, and Mrs. Leatherwood married Jerry Leatherwood, the natural father. Whether the son ever knew this prior to his trial is not disclosed. Further, as a youth he received several speeding tickets, and once got into a speeding chase with a local law enforcement officer of Louisiana, and was fined $250–350. Finally, he quit school a few weeks before graduating.

Other than these events, there is absolutely nothing in the record to set Michael Dale Leatherwood apart from thousands of other boys across this country.

He was born and reared in Louisiana. His father, in the insurance business, travels for a living. His mother is a housewife. His parents live on a small farm, and have cows and chickens. He belongs to the Presbyterian Church, helped clean his church, and washed cars on Saturdays as one of his church activities. He was considered "tenderhearted." His school grades were in the "A's and B's." He was in the school chess club, and worked while attending school.

Three weeks before he was to graduate, he quit high school in April, 1980, and joined the United States Army. His mother thought he had a disappointing love affair, and his school principal and parents tried without success to dissuade him from quitting school.

His short military record was likewise uneventful. He caused no problems as a soldier.

After basic training in Fort Jackson, South Carolina, he was assigned to Fort Polk, Louisiana, not far from his home.

Except for his two acquaintances, about whom I will presently note, what is above stated is all the record tells us about Michael Dale Leatherwood prior to August 24, 1980. It would have been preferable had this record revealed a great deal more about his life. Only his parents and his company commander gave any information about his lifestyle, environment, and character. No teacher, school principal, family friend, or person who knew him as he grew up testified. The defense chose not to call any such witnesses. Indeed, for reasons best known to the parents and defense counsel, the record is silent on whether he has any brothers or sisters.

While stationed at Fort Polk, he became acquainted with George David Tokman and Jerry Fuson. About two weeks before August 24, 1980, Fuson told Michael his car was in Jackson, and needed Michael to drive him over to Jackson to get it. The trade was that Fuson would furnish the gas needed for the trip. Tokman accompanied them on the trip.

As stated in the majority opinion, when they got to Jackson on Saturday, August 24, 1980, and got Fuson's car started, Fuson only had $10, not enough money to purchase

1. It might even be persuasively argued that the Legislature has not only given us the authority, but implores our use of it. I submit it is far better, as well as considerably less expensive a burden on the taxpayers of this state, for us to terminate one of these cases, rather than have it terminated years later after protracted federal court proceedings. There are now 30 prisoners on death row at our state penitentiary. Nearly all of these inmates have federal court proceedings in progress to spare their lives. The last execution in Mississippi was 1964.

sufficient gasoline to get either car back to camp. Fuson tried to get financial assistance from a military service called "Comfort Pay," but was told by a sergeant they were ineligible because they were not in Jackson on leave. Another military aid called "Manpower" was likewise unavailing because it was after 5:00 p.m., and the office was closed.

Tokman, the "tough guy" of the trio, suggested they rob a taxi driver. This robbery and murder are sufficiently detailed and need no repetition. Michael Dale Leatherwood participated in the homicide by throwing a rope around the elderly taxi driver's neck when he had the cab stopped. Tokman and Leatherwood were on the back seat, and after Leatherwood threw the rope around the driver's neck, the driver turned to climb over into the back seat. It was then that Tokman stabbed him to death with a knife.

Tokman wounded himself in the stabbing, and got treatment in Vicksburg. While being treated, Leatherwood and Fuson forged the credit card of the taxi driver and stole a wallet. The trio returned to Louisiana and went by the Leatherwood home. While in Beauregard Parish, Louisiana, where his home was located, Michael Dale Leatherwood aided Tokman in the commission of a robbery in a Dollar Store in the small community of Merryville, where Leatherwood had attended junior high school and was obviously well known. He and Fuson also assisted Tokman in the robbery of a motel in Lake Charles, Louisiana. They returned to Fort Polk on Thursday, August 26, 1980. The next day they were arrested, and Leatherwood gave a full confession to law enforcement officers.

He was tried in Louisiana for the robberies and sentenced to six and fifteen years without parole.

Why does a young man of 18, whose life was uneventful, suddenly become embroiled in such brutal, senseless, and bizarre episodes? Here is what Leatherwood said:

I felt several things. I felt ashamed that I did them. I feel sorry for the victims, both Mr. Jackson (sic) Taylor and the people that were involved in the armed robberies. I feel sorry for what I have done to my parents. I have wrecked almost totally everything they ever worked for. Everything they ever tried to make me believe in, in the space of a few days, I totally destroyed it. I have destroyed their home. I have put an extreme mental and financial burden on them and I have made them lose confidence in me. Everything that they had done from the time I was a little kid until then, that, in a space of those few days, it was as if it was a piece of paper to me and I had wadded it up and thrown it away.

I do not minimize the terrible act of murder of Albert Taylor, or try to explain the reason Michael Dale Leatherwood was a participant. His vacillation or refusal to say "no" when Tokman suggested a robbery, the insidious progress of the plot and Leatherwood's being led further, step by step, to what he claims he hoped would only be a robbery, and his actual participation in the gory crime, presents a weak or flawed character, one which would challenge the most creative talent of literature, or perceptive mind of psychiatry to reveal.[2]

From this record, Leatherwood's character is as uncharted as Wilde's condemned man in "The Ballad of Reading Gaol":

I never saw a man who looked
With such a wistful eye
Upon that little tent of blue
Which prisoners call the sky, ...

We can observe that after the murder there was no looking or turning back for Leatherwood, which he apparently knew.

I grieve for the family of Mr. Taylor, an innocent, harmless, good citizen. If I thought putting Leatherwood to death would save the life of a single person, my view would be altered.

Is it wrong to also grieve for the parents of Michael Dale Leatherwood, who did the

2. Theodore Dreiser, in *An American Tragedy*, recalls a young man similar to Leatherwood.

best they could to give him a Christian rearing, to see that he grow into a worthwhile, useful citizen of this great land? Can we give these permanently disgraced parents no consideration whatever? Or, the thousands of other mothers, fathers, brothers, sisters across this great nation, who each night kneel beside their beds and pray for an errant son or brother?

Is it in the best interest of society to take his life?

When a young man, in truth no more than a boy, has led a good life, comes from good parents, and who one day for some profoundly strange reason acts in a manner violently contrary to the previous 6,000 days of his existence, is our only answer: put him to death?

Can anyone say putting him to death is better for society than condemning him to life imprisonment? Does the majesty of our law demand we put him to death?

As an individual, each member of this Court is painfully cognizant of his fallibility, prejudices, weaknesses, and human frailties.

As the highest Court in this state, however, we have the solemn and unique responsibility to express the hope and aspiration of all our people for a just and humane state. We must be willing to say the unpopular when it needs saying. We must search for the wise, not simply the popular answer. We each know this. And further, if we are to preserve the confidence of the people in our institution for the future, there must be a public confidence that members of this Court can give no thought to our personal consequences, but only to that which in our best judgment should be done with a case. It can and will be said we have made a mistake. It should never be said we failed to do our best.

Of all public officials it should especially be said of a judge, upon whom the people have the right to rely, that when the heat is applied, he is not going to exit the kitchen.

Everything I know as a man, and whatever knowledge I possess as a lawyer and a judge, tells me that society has a better answer than putting Michael Dale Leatherwood to death.

As a justice on this Court, I have the obligation to express this view.

From whence comes the notion that sentence to life imprisonment is not in itself a terrible punishment? Are we required in *this* case to inflict the *very worst* sentence a society is empowered to impose in *any* case?

I would adjudicate, which is the only authority this Court has in this case, to remand to the circuit court for sentence to life imprisonment.

DAN M. LEE, J., joins this dissent.

ROBERTSON, Justice, dissenting:

A.

At his sentencing trial Defendant Michael Dale Leatherwood asked that the jury be instructed as follows:

*JURY INSTRUCTION NO. 25*

"You are instructed that you need not find any mitigating circumstances in order to return a sentence of life imprisonment."

The Circuit Judge refused the instruction.[1]

Without doubt the jury at the sentencing phase had the complete and unreviewable power to sentence Michael Leatherwood to life imprisonment, no matter how great the aggravating circumstances nor how lacking the mitigating circumstances. In refusing to grant Instruction No. 25, however, the trial court in effect ruled that the jury must not be allowed to know that it has this power.[2] I find it anomalous indeed that

1. We note that in *Tokman v. State*, 435 So.2d 664, a companion case to this one, No. 53,676 on this Court's docket, such an instruction was granted. See Instruction D-16 in *Tokman*. These two prosecutions arise out of the same capital murder. We are at a loss to understand why the trial judge would grant such an instruction in the *Tokman* case and refuse it in the *Leatherwood* case.

2. There is another related instruction that ought to have been granted but wasn't. It reads:

JURY INSTRUCTION NO. 2

The court instructs the jury that the prosecution carries the burden of showing not only that aggravating circumstances exist but also that they are sufficient enough to warrant

such matters should be kept secret from the jury, particularly when a life is at stake.[3] I would reverse and remand for a new sentencing phase trial.[4]

B.

Constitutionally, a state may not limit the circumstances or factors that may be considered in mitigation of punishment at the sentencing phase of a capital murder trial. *Lockett v. Ohio*, 438 U.S. 586, 608, 98 S.Ct. 2954, 2966, 57 L.Ed.2d 973 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

The sentencing phase is far more than a mere evidentiary hearing. It is a hearing before a jury the sole and only purpose of which is to determine whether or not the defendant will be put to death. To be sure, evidence may be taken and facts considered. Aggravating circumstances are weighed against mitigating circumstances and vice versa. Yet we kid ourselves and exhibit a cheapened sense of humanity if we pretend that facts are what—and all—that ought be important at sentencing.

The awesome decision with which the sentencing jury is charged necessarily implicates our most fundamental notions of the uniqueness and dignity and worth of a human being. To many these notions have strong religious and theological undergirdings. Others are guided by resort to secular ethics. The juror's sense of justice and fairness is always tested.

At sentencing both lawyers, the defendant and witness are entitled to discuss, from the most philosophical level to the most practical, the question of life or death. The prosecution is entitled to argue for the death penalty on grounds of punishment, deterrence, retribution and its perceived necessity for societal vengence. The defense is likewise permitted to urge the sparing of the life of the defendant for reasons normally considered outside the legitimate concerns of the positive law, reasons such as mercy, sympathy, forgiveness and human decency.

These and other non-fact questions are necessarily a part of the sentencing inquiry. No doubt each juror must act according to his own conscience. Yet, any juror who eschewed such considerations would be deserving of society's contempt.

C.

Against this backdrop, surely two things are obvious. First, the jury should be instructed that it is not required to find any mitigating circumstances in order to return a sentence of life imprisonment. Second, defense counsel is entitled to argue—in mitigation of sentence—any consideration re-

death. If the prosecution merely proves the existence of an aggravating circumstance, you are free to find it insufficient to warrant death and are not required to automatically impose death.

3. Justice Hawkins has written an excellent opinion discussing essentially the same issue in *Hill v. State*, 432 So.2d 427, (1983) [Hawkins, J., dissenting as to Part IV(I)]. I have concurred in that opinion. Believing as I do that the point is logically compelling and legally sound, I approach it here from a different, perhaps more theoretical perspective. My opinion here is intended to complement Justice Hawkins' dissenting opinion in the Alvin Hill case.

4. As indicated above, Instruction No. 25 was requested at the trial level but was denied. The point has not been assigned as error here. For the reasons stated by Justice Hawkins in his dissenting opinion in the Alvin Hill case and for the reasons I state hereafter, I consider the point fundamental. This Court has a long-standing and venerable tradition in death penalty cases of searching the record and considering on appeal arguably meritorious points even though not formally assigned as error. See, e.g., *Augustine v. State*, 201 Miss. 731, 29 So.2d 454 (1947); *Gipson v. State*, 203 Miss. 434, 437, 35 So.2d 327, 328 (1948); *Shaffer v. State*, 46 So.2d 545, 545 (Miss.1950); *Russell v. State*, 226 Miss. 885, 886, 85 So.2d 865 (1956); *Drake v. State*, 228 Miss. 589, 590, 89 So.2d 593, 593 (Miss.1956); *Irving v. State*, 228 So.2d 266, 268 (Miss.1969); *Bell v. State*, 360 So.2d 1206, 1215, 1217-1218 (Miss.1978). Informed by that tradition and experience, I consider the trial judge's refusal to grant Jury Instruction No. 25 a viable issue before the Court on this appeal.

motely relevant to the question whether the defendant should live or die.

D.

Via Instruction No. 25, Defendant Leatherwood sought to invoke one of the fundamental premises of the right of trial by jury in criminal cases. No matter what the Crown says about the accused, the jury can always say, No. No matter what laws are passed, no matter what acts are made criminal, the jury can say, No. And give no reason. And the defendant cannot be tried again.

There is no directed verdict of guilty in a criminal case. It matters not how overwhelming the evidence of guilt, nor how complete the confession. The defendant's right to acquittal and freedom is absolute if the jury chooses—for whatever reason—to ignore that evidence and that confession. And if the defendant has this right, he is entitled to have the jury so informed. Under our process, juries are informed of their powers, their duties, and of the rights and burdens of the parties, by way of instructions. This is what Leatherwood sought here.

Jury nullification has been a part of our system of criminal justice for hundreds of years—a fundamental *raison d'etre* of the system itself, one of those rights of free Englishmen that we Americans fought a revolution to secure. The state can seek unjust punishments. The state is fallible.[1] And so a last measure of protection, protection against the state's fallibility, is built into our criminal justice system. The right and power of a jury to say, No!, this man may not be put to death. Jury nullification is an accepted and unreviewable power where mere liberty is at stake. How much more vital it becomes when life itself is the

1. Since the reinstatement of the death penalty in many states following *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972); there have been at least six documented cases in which death sentences were imposed (though fortunately not executed) upon persons later found not guilty. In Arizona in 1977, Jonathan Treadaway, a capital defendant who had been sentenced to death and whose conviction had been reversed, see *State v. Treadaway*, No. CR83446, slip op. (Ariz.Sup.Ct. 1977). In 1978, Earl Charles was ordered freed by a superior court judge in Savannah, Georgia, who three and one-half years earlier had sentenced him to death, because Charles' innocence was demonstrated by a police detective who came forward to admit that he had seen him at work on the date and at the time that the crime was committed. *See State v. Charles*, No. 23,392 (Ga.S.Ct. July 5, 1978) (statement of prosecutor's intent to place case on dead docket). *See also* Atlanta Constitution, July 6, 1978, § A, at 1, col. 3, Savannah Morning News, June 15, 1978, § D, at 1. Also in 1978, the Court of Appeals for the Fifth Circuit granted Calvin Sellars bond pending state appeals, affirming a district court judge who held that he had been convicted and sentenced to death based upon perjured testimony. *See Sellars v. Estelle*, 571 F.2d 1314 (5th Cir. 1978) (per curiam). *See also Sellars v. Estelle*, 450 F.Supp. 1345 (S.D.Tex.1978). In 1979 prosecutors decided not to retry Sellars because a key witness could not be found. In 1979, Gary Beeman, who had been sentenced to death, having successfully appealed his conviction, was retried a second time and was acquitted. *See Ohio v. Beeman*, No. 9833, slip op. (Ashtabula County Ct.C.P.) (sentenced June 28, 1976, acquitted from second trial October 4, 1979); *Ohio v. Beeman*, No. 894, slip op. (Ohio Ct.App., 11th App.Dist. April 20, 1978) (reversing first conviction). In the same year, Erwin Simants, following a successful state post-conviction petition, see *Simants v. State*, 202 Neb. 828, 277 N.W.2d 217 (1979), was acquired at a new trial by reason of insanity, see *Simants v. State*, No. 82904, slip op. (Lincoln County, Nebraska D.Ct. October 1980). Finally, in 1980, a district attorney in Flint Judicial Circuit of Georgia released Jerry Banks, who had been sentenced to death and who had spent 6 years in prison litigating his case in appellate and post-appellate proceedings, because the prosecution was found to have withheld critical evidence. *See* Atlanta Constitution, January 6, 1981, § A, at 1, col. 1. *See also Banks v. State*, 235 Ga. 121, 218 S.E.2d 851 (1975) (reversing original conviction on grounds that prosecutor knowingly withheld evidence favorable to defendant); Wicker, *The Final Verdict*, N.Y. Times, Oct. 17, 1980, § A, at 31, col. 5. Banks had been sentenced to death again after a second trial. *See Banks v. Glass*, 242 Ga. 516, 250 S.E.2d 431 (1978) (denying habeas petition); *Banks v. State*, 237 Ga. 325, 227 S.E.2d 380 (1976), cert. denied, 430 U.S. 975, 97 S.Ct. 1667, 52 L.Ed.2d 370 (1977). And what Mississippian does not know the saga of Will Purvis [*Purvis v. State*, 71 Miss. 708, 14 So. 268 (1894)] whose noose slipped as he fell from the hangman's scaffold. The true murderer later confessed.

issue. And how much more Michael Leatherwood was entitled to have the jury instructed correctly regarding its powers and, beyond that, to have his lawyer argue that the jury should exercise its powers.[6]

The Mississippi Legislature had the power to enact a carefully drawn guided discretion capital murder statute. *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) says so much. The State of Mississippi had the power to invoke that statute and charge Michael Leatherwood in an indictment. And upon Leatherwood's guilty plea to the charge of capital murder, the state had the right to require that Leatherwood go before a jury where it could demand that he be put to death. If done in conformity with the Constitution and law, all of this the state may do.

But when the state demands that the jury return the death sentence, it still must face the power of jury nullification. And if the jury has the power of nullification, it is entitled to know that it has that power. Michael Leatherwood was entitled to have the jury know that it had the power of nullification. And if he was entitled to have the jury know of that power, he was entitled to have the jury so instructed.

We are aware that many, insensitive to the history of our country and our system of law, may take exception to what we write here. All of us are frustrated, frequently angered, that violent crime seems so beyond our power to control. We are inclined to cut corners. We forget our heritage. Be all of that as it may, it is much too late to doubt the wisdom of the many protections afforded those accused of crime. Plagiarizing Judge Learned Hand, to many this is and always will be folly; but upon it we have staked our all.[7]

In spite of all of the constitutional and procedural safeguards, the state may be wrong. In spite of the most deliberate exercise of its lawmaking powers, the state legislature may be wrong when it authorizes capital punishment in a particular case or class of cases. Despite the presence of abundant circumstances declared aggravating by the positive law, despite the total absence of any circumstances legally deemed mitigating, there may be non-fact considerations which render it clear beyond a reasonable doubt that a defendant's life should be spared. The architects of our legal system understood these premises. And that is why they built into our system the venerated power of jury nullification.

Instruction No. 25 should have been granted.

E

I have read Justice Hawkins' dissenting opinion and have re-read my own. Mine is polemics. His is poetry. I was about to join Justice Hawkins 'till I remembered that Keats and Whitman had no co-authors.

HAWKINS, Justice, specially concurring to Justice ROBERTSON'S dissent:

For the reasons stated in my dissents in *King v. State*, 421 So.2d 1009 (Miss.1982), and the recent case of *Hill v. State*, 432 So.2d 427 (Miss.1983), I fully concur that the circuit judge should have granted instruction number 25 which would have given the jury the unfettered discretion to determine whether Leatherwood should have been sentenced to life imprisonment or death.

I am uncomfortable in the manner this issue is addressed in this case by Justice Robertson. The issue was never presented to or addressed by this Court in the majority opinion. Counsel for Leatherwood made no complaint on appeal of the refusal of the circuit judge to grant this instruction.

While it is no doubt true appellate courts have upon occasion rendered landmark decisions on an issued addressed by them sua

6. Here we would remind one and all of Justice Hawkins' eloquent dissent in *Johnson v. State*, 416 So.2d 383, 393–399 (Miss.1982).

7. Judge Hand used these words in a First Amendment context. See *United States v. Associated Press*, 52 F.Supp. 362, 372 (S.D.N.Y. 1943). They are no less apt here.

sponte.[1] I am not prepared for any such obligation, explicit or implicit, on the part of this Court.

This case is of ultimate importance to the accused. At the same time, we are not strangers to the many civil and criminal cases in which our decisions have the broadest possible impact throughout the state. I simply do not have the physical or mental resources to say, or imply, to any litigant that I will search the record for errors which are not even intimated top, side, or bottom by their lawyers. If we comb a record for errors in this case, are we obligated to do so in every case?

Standards of review should be applied evenly and with articulated reasons for their application. To do otherwise will, in my respectful view, breed uncertainty and confusion, from which there will inevitably fester hypocrisy as well as contempt. Litigants will know the cases in which we have found some non-assigned error, because our opinions will call them to the attention of the parties. But what about all the remainder of the cases? How can litigants ever know the cases in which we ignore *sub silentio* this responsibility Justice Robertson would have us assume?

George David TOKMAN

v.

STATE of Mississippi.

No. 53676.

Supreme Court of Mississippi.

June 1, 1983.

Rehearing Denied Aug. 17, 1983.

Defendant was convicted in the Circuit Court, Hinds County, William F. Coleman, J., of capital murder, being subsequently sentenced to death, and he appealed. The Supreme Court, Patterson, C.J., held that: (1) trial court properly excused for cause venireman who could not be fair and impartial because of opposition to death penalty; (2) trial court properly restricted cross-examination of state witness as to false statements made upon entering army; (3) robbery committed one day after murder was properly considered as aggravating circumstance; (4) consideration as aggravating circumstances of both murder while engaged in robbery and murder for pecuniary benefit was not impermissible "doubling up" of aggravating circumstances; (5) jury was properly allowed to find aggravating circumstance if they believed murder was especially heinous, atrocious, or cruel; (6) evidence supported finding that murder was especially heinous, atrocious, or cruel; (7) finding that murder was committed for purpose of avoiding lawful arrest was supported by evidence; (8) trial court did not err in refusing requested instructions on jury's possible mercy for defendant; and (9) sentence of death was neither contrary to weight of evidence, excessively severe, nor disproportionate in comparison to other capital cases.

Affirmed.

Hawkins, J., dissented and filed opinion in which Dan M. Lee, J., joined.

1. Jury ⇐108

Where venireman questioned in capital murder case expressed conscientious scruples against death penalty, and later stated to trial court that he didn't think he could vote guilty, knowing death penalty could be imposed, trial court properly excused venireman for cause.

2. Witnesses ⇐344(5), 345(1)

In prosecution for capital murder, trial court did not err in restricting cross-examination of state witness concerning his prior convictions and false statements made upon

1. *See, e.g., Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

IN THE SUPREME COURT OF MISSISSIPPI

No. #53,914

WEDNESDAY, AUGUST 17, 1983, COURT SITTING : : : : : : : : : :

MICHAEL DALE LEATHERWOOD

vs.

STATE OF MISSISSIPPI

This cause this day came on the be heard on Petition for Rehearing and this Court having sufficiently examined and considered the same en banc and being of the opinion that the same should be denied doth order that said Petition be and the same is hereby denied.

MINUTE BOOK "BW", Page 417

ATTEST

A True Copy
This the 22nd day of Aug 1983
ROBERT E. WOMACK, CLERK
SUPREME COURT OF MISSISSIPPI
By M. Sheppard

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT

OF HINDS COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

VS. CAUSE NUMBER S-216

MICHAEL DALE LEATHERWOOD

JURY VERDICT AND SENTENCING OF THE DEFENDANT BY THE COURT

NOW COMES the District Attorney who prosecutes for and on behalf of the State of Mississippi and the Defendant, Michael Dale Leatherwood, in his own proper person, in custody and by counsel, being called to answer a charge of Capital Murder, being arraigned upon the charge in the indictment, duly entered a plea of Not Guilty thereto, and said Defendant, thereafter, on the 8th day of December, 1981, having withdrawn his said plea of not guilty and having duly entered his plea of guilty of said charge of Capital Murder.

Thereupon, the Court entered upon the sentencing phase of said proceeding, and then came a Jury of twelve good and lawful citizens who being duly empanelled, specially sworn and charged to well and truly try the issue joined and a true verdict render according to the law and the evidence. After hearing all the evidence and arguments of counsel, and receiving the instructions of the Court, said Jury retired for the purpose of fixing punishment and presently returned into open Court the following verdict, to-wit:

"We, the Jury, find unanimously and beyond a reasonable doubt the following aggravating circumstances;

1. The Capital Murder was committed while the defendant was engaged in the commission of robbery;

2. The Capital Murder was committed for pecuniary gain;

3. The Capital Murder was especially heinous, atrocious or cruel;

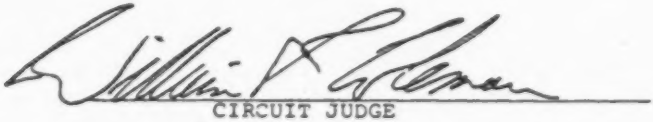
4. The Capital Murder was for the purpose of avoiding a lawful arrest."

"We, the Jury further find unanimously from the evidence and beyond a reasonable doubt that after weighing the mitigating circumstances and the aggravating circumstances, one against the other, that the aggravating circumstances do out-weigh the mitigating circumstances and that the defendant should suffer the penalty of death."

Said verdict being signed by Jeffrey O'Neal Waldrop, Foreman of said Jury.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the defendant, Michael Dale Leatherwood, for such his offense of Capital Murder, to which he has pleaded guilty, and for which the Jury has determined that he should suffer the penalty of death, be and he is hereby sentenced to be remanded to the lawful custody of the Sheriff of Hinds County, Mississippi, for immediate transportation to the Maximum Security Unit at the Mississippi State Penitentiary, Parchman, Mississippi, where at some time on the 21st day of January, 1981, he shall suffer the penalty of death by lethal gas.

SO ORDERED, this the 9 day of December, 1981.



CIRCUIT JUDGE

DEC 30 - DEC 29 1981

C Smz

REPORT OF THE TRIAL JUDGE
WHERE DEATH PENALTY IMPOSED

State v. MICHAEL DALE LEATHERWOOD

Capital Offense for which Penalty Imposed Murder during robbery.

Other offenses in same trial None

A. Data Concerning Defendant:

1. Age 18 at the time of offense. 2. Sex Male 3. Marital Status:
4. Children (a) Number of 0 — Never Married X; Married ___; Divorced ___; Spouse Dec'd. ___
(b) Ages ___
5. Parents: Father- living: yes X No ___
Step- Mother- living: Yes X No ___
6. Highest level of education 12th grade
7. Intelligence Level: (IQ below 70) Low ___
(IQ 70 - 100) Medium ___
(IQ above 100) High X
8. Psychiatric evaluation performed: Yes X No. ___
Is Defendant:
(a) Able to distinguish right from wrong? Yes X No ___
(b) Able to adhere to the right? Yes X No ___
(c) Able to cooperate intelligently in his own defense? Yes X No ___
(d) If examined, were character or behavior disorders found? Yes ___ No X (see at report)
If yes, elaborate ___

9. What other pertinent psychiatric or psychological information was revealed?
None

10. Brief impressions of sentencing judge as to conduct of Defendant at trial and sentencing: Very well conducted with genuine feeling of remorse and concern for his future.

11. Brief resume of defendant's general position and reputation in the community: (social and economic background, work record, etc.)
Appears to have been reared in an average middle-class home environment with average economic opportunities. Defendant had a part-time job during high school and

earned enough for most of his own expenses. Defendant joined the army 4 months prior to commission of the murder. In high school he received very high grades.

B. Data Concerning the Trial:

1. How did the defendant plead? Guilty
2. Was the case tried with a jury? Yes
3. Brief Summary of the Evidence at Trial on Guilt: In addition to guilty plea, the evidence during the sentencing phase, including the Defendant's testimony indicated clearly that 3 young soldiers from Ft. Polk, La. came to Jackson to pick up a disabled car owned by one of the 3. After arriving in Jackson, they realized that they did not have sufficient funds to get back to Ft. Polk. Efforts to legally obtain funds were fruitless, and a plan was devised and agreed upon to rob a cab driver. One driver was rejected as being too young and strong. The victim was an elderly and small person, and the plan was carried out. One rode in the front seat to stop the car and to obtain the money, and Defendant, while sitting behind the driver, put a rope around his neck and pulled to (see attac
4. Brief summary of the evidence at trial on sentencing: (List all statutory, aggravating and mitigating circumstances under 1977 Miss. Gen. Acts, Ch. 458, Sec. (2) 5 and 6 [Amending Miss. Code Ann. § 97-3-21 (1972)] which appear in this case.

(See attached)

5. List any other aggravating or mitigating circumstances: None
6. Does the Defendant's physical or mental condition call for special consideration? None
7. Although the evidence suffices to sustain the verdict, does it foreclose all doubt about the defendant's guilt? Yes

11. B. 3. (cont'd)

the rear. The third, sitting on the right rear, stabbed or hit the victim in the head with a pocket knife causing his death. The cab was driven back near the pickup point where his wallet, a gun and keys were taken. The victim was left on the ground near his cab. On the following day Defendant and one of the soldiers robbed a store in La. Two days later they robbed a motel. When arrested in La., five days after the murder, the Defendant gave a full confession to the crime. The Defendant had no prior criminal history. The Defendant testified that he was truly remorseful for his crime.

The aggravating factors as found by the Jury: (1) A capital murder was committed while the Defendant was engaged in a robbery. (2) the murder was for pecuniary gain; (3) the murder was especially heinous, atrocious or cruel; (4) the capital murder was committed for the purpose of avoiding a lawful arrest. The mitigating factors that the Jury was allowed to consider were (1) age of the Defendant at the time of the crime, which was 18; (2) any and all other matters, facts, circumstances which the Jurors considered mitigating; (3) any circumstances surrounding the Defendant's life and character. Defendant introduced testimony that he had undergone a religious transformation and was rebaptised in the First Presbyterian Church of Deriter, La., his hometown. (4) the Defendant had no significant history of prior criminal activity; (5) whether the defense was committed while the Defendant was under the influence of extreme mental or emotional disturbance. At the time of the offense, the testimony established that the Defendant and the others had not slept for almost 40 hours. (6) Whether Defendant was an accomplice in a capital offense committed by another person and his participation was relatively minor; (7) whether the Defendant acted under extreme duress or under substantial domination of another person. There was considerable testimony that the leader of the three was Tokman. The Defendant testified that he was frightened of Tokman and that Tokman waived a knife at him immediately prior to the murder; (8) whether the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. There was no evidence of use of alcohol or drugs. Defendant testified that he did not truly believe that the robbery and the murder would be carried out.

8. Was the jury instructed as to all aggravating and mitigating circumstances? Yes

9. Data concerning victim of crime: (State generally any known facts concerning the victim which may have had any influence on the verdict or sentence (e.g., relationship to defendant by kin, friendship or employment; sex and race of victim, victim's position in community, age, etc.)
The victim was a 67-year-old black male who was a stranger to the Defendant and was selected at random among cab drivers.

C. Representation of Defendant:

1. Date counsel secured Unknown
2. How secured: Retained X Appointed
3. If appointed, why?
4. Years defense counsel has practiced law 20 yrs.
5. Nature of defense counsel's practice: Mostly civil ; General X ; Mostly criminal .
6. Did the same counsel serve throughout trial? Yes
If not, explain in detail:

D. General Considerations:

1. Was race raised as an issue in the trial? No
2. Did racial considerations otherwise appear in the trial? No . If yes, explain.
3. Were members of defendant's race represented on the jury? Yes, 11
4. Was jury instructed to exclude race as an issue? No .
5. Was there extensive publicity in the community concerning this case? Yes
6. Was the jury instructed to disregard such publicity? Yes .
7. Was the jury instructed to avoid any influence of passion, prejudice, or any other arbitrary factor when imposing sentence? Yes
8. Was there any evidence that passion, prejudice or other arbitrary factor may have influenced the jury? No . If so, explain:
9. General comments of the Trial Judge concerning the appropriateness of the sentence imposed in this case (to include sentences imposed in any similar cases the Judge may have tried):
Facts established are that these extremely young men planned to rob a cab driver by use of force with Tokman furnishing most of the leadership. Tokman and the Defendant both assaulted the victim, and when he resisted, Tokman used a knife, resulting in death. Tokman received death penalty in an earlier trial, and the third Defendant was allowed to plead guilty (see attached)

to manslaughter and received a 20-year sentence in exchange for his testimony against Tokman and Defendant. The case was well-presented to the Jury and the Jury decided against the Defendant. The sentence is appropriate.

E. Chronology of Case:

| | | Elapsed Days |
|---|---|---|
| 1. | Date of Offense August 24, 1980 | |
| 2. | Date of Arrest In La., 8/29/80; Misc., | May 1981 |
| 3. | Date Trial Began 12/7/81 | 465 |
| 4. | Date Sentence Imposed 12/9/81 | 467 |
| 5. | Date post-trial motion ruled on 12/30/81 | 488 |
| 6. | Date Trial Judge's Report completed 12/30/81 | 488 |
| *7. | Date received by Supreme Court | |
| *8. | Date sentence review completed | |
| *9. | Total elapsed days | |

*To be completed by Supreme Court

This report was submitted to counsel for the State and Defendant for such comment as each desired to make concerning the factual accuracy of the report, and such comments, if any, are attached.

Circuit Court Judge
County of

To be completed by Supreme Court Research Assistant:

1. List of similar cases and penalty imposed:

2. Facts in record tending to show possibility of influence of passion, prejudice or other arbitrary factors:

3. Facts in record to support a finding of aggravating circumstances: _____

4. Facts in record to support a finding of mitigating circumstances: _____

SOURCES: Laws, 1976, ch. 470, § 4, eff from and after January 1, 1977.

SEPARATE SENTENCING PROCEEDING TO DETERMINE PUNISHMENT IN CAPITAL CASES

**§ 99-19-101. Jury to determine punishment in capital cases in separate sentencing proceeding; aggravating and mitigating circumstances to be considered.**

(1) Upon conviction or adjudication of guilt of a defendant of capital murder or other capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a jury to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Mississippi. The state and the defendant and/or his counsel shall be permitted to present arguments for or against the sentence of death.

(2) After hearing all the evidence, the jury shall deliberate on the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5) of this section;

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (6) of this section, which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) For the jury to impose a sentence of death, it must unanimously find in writing the following:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5) of this section; and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances.

In each case in which the jury imposes the death sentence, the determination of the jury shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) of this section and upon the records of the trial and the sentencing proceedings. If the jury does not make the findings requiring the death sentence, the court shall impose a sentence of life imprisonment.

(4) The judgment of conviction and sentence of death shall be subject to automatic review by the supreme court of Mississippi within sixty (60) days after certification by the sentencing court of entire record, unless the time is extended for an additional period by the supreme court for good cause shown. Such review by the supreme court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) Aggravating circumstances shall be limited to the following:

(a) The capital offense was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital offense was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, aircraft piracy or the unlawful use or detonation of a bomb or explosive device.

(e) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital offense was committed for pecuniary gain.

(g) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital offense was especially heinous, atrocious or cruel.

(6) Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

**SOURCES: Laws, 1977, ch. 458, § 2, eff from and after passage (approved April 13, 1977).**

**Research and Practice References—**
21 Am Jur 2d, Criminal Law §§ 585–586, 595.
24B CJS, Criminal Law §§ 1985, 2001.

**ALR and L Ed Annotations—**
Unanimity as to punishment in criminal case where jury can recommend lesser penalty. 1 ALR3d 1461.
Propriety of imposition of death sentence by state court following jury's recommendation of life imprisonment or lesser sentence. 8 ALR4th 1028.

## JUDICIAL DECISIONS

The trial court in a murder prosecution erred in requiring defendant at the punishment stage of trial to proceed before the state, since the state has the burden of proof not only as to guilt but also as to aggravating circumstances during the punishment stage of a trial. Gray v State (Miss) 351 So 2d 1342, later app (Miss) 375 So 2d 994.

A prior conviction of another capital offense or of a felony involving the use or threat of violence to the person is admissible at the punishment stage of a trial for a capital crime as an aggravating circumstance to be considered by the jury in determining punishment. Gray v State (Miss) 351 So 2d 1342, later app (Miss) 375 So 2d 994, cert den 446 US 988, 64 L Ed 2d 847, 100 S Ct 2975, reh den (US) 65 L Ed 2d 1174, 101 S Ct 30.

The statutory provision allowing a jury in a capital murder prosecution to consider, on the issue of aggravating circumstances, whether "the capital offense was especially heinous, atrocious, or cruel," was not unconstitutionally vague; pursuant to the statute requiring appellate review of all death sentences, such a sentence would not be reversed where it was not imposed under the influence of passion, prejudice or any other arbitrary factor; where the evidence fully supported the jury's unanimous findings that two aggravating circumstances existed; where the death sentence was not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant; and where the jury carefully weighed the mitigating circumstances and found that they were insufficient to outweigh the two aggravating circumstances. Washington v State (1978, Miss) 361 So 2d 61, cert den 441 US 918, 60 L Ed 2d 388, 99 S Ct 2016.

In a prosecution for capital murder committed during a burglary, the jury's verdict imposing the death penalty complied with this section, despite defendant's contention that the jury did

not state the specific facts upon which it based its sentence, where neither this section nor case law required such detailed findings. However, pursuant to § 99–19–105, the death sentence would be reversed and the case remanded for sentencing to life imprisonment, where the victim, upon seeing defendant, began firing his pistol and was then shot by defendant, and where defendant had the opportunity to shoot the victim's wife but did not; the penalty of death in this case was disproportionate to the penalty imposed in similar cases. Coleman v State (1979, Miss) 378 So 2d 640.

This section does not impose cruel and unusual punishment. Nor does it unconstitutionally shift the burden of proof during the sentencing phase by requiring a defendant to come forward with proof of mitigating circumstances or automatically have the death penalty imposed, since there is no requirement that the jury impose death when aggravating circumstances are shownand mitigating circumstances are not; proof of aggravating circumstances may still be found insufficient by the jury to require death and the state still carries the burden of showing not only aggravating circumstances, but that the circumstances are sufficient to warrant death. Furthermore, this section is not unconstitutional for failing to provide guidelines for appellate review, since a comparison with other cases where the death penalty was upheld is constitutionally adequate and comparison with cases of life imprisonment is not required; the use of the "especially heinous, atrocious, or cruel" aggravating circumstances is not vague, overbroad or violative of the Fifth Amendment, and the statute does not unconstitutionally allow unlimited evidence at the sentencing stage, since evidence is limited to the aggravating circumstances listed in the statute. Coleman v State (1979, Miss) 378 So 2d 640.

In a prosecution for capital murder committed during an attempted robbery, the evidence supported the jury's finding of statutory aggravating circumstances, the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor, and the sentence of death was not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and defendant; furthermore, prosecutorial discretion was not abused even though defendant's accomplice, who turned state's evidence, was permitted to plead guilty to manslaughter, while defendant, who fired the fatal shot, was given the death penalty. Culberson v State (1979, Miss) 379 So 2d 499.

The death penalty statute is not unconstitutionally vague. Jones v State (1980, Miss) 381 So 2d 983.

In a prosecution for capital murder committed during a robbery, the sentence of death was not imposed by the jury under the influence of passion or prejudice (§ 99–19–105), and the evidence supported the jury's finding that the mitigating circumstances did not outweigh the circumstances, where the evidence in mitigation of the sentence was that defendant was only 17 or 18 at the time of the offense, and that there was no testimony indicating that this codefendant had struck the blows causing death, where the jury found that the offense, committed during a robbery, was especially heinous and cruel, and that defendant had been previously convicted of a felony involving the use or threat of force, and where defendant himself offered no evidence in mitigation of the sentence. The sentence was not excessive or disproportionate to similar cases in which such sentence has been imposed. Jones v State (1980, Miss) 381 So 2d 983.

In a prosecution for capital murder, the trial court properly admitted evidence of a conviction for armed robbery that was entered after the indictment for murder as evidence of aggravating circumstances in the sentencing phase of the trial. Under this section, a conviction entered against a defendant between the time that a capital offense was committed and the time of trial may be admitted into evidence as an aggravating circumstance. Jones v State (1980, Miss) 381 So 2d 983.

In a prosecution for capital murder, the trial court did not err in allowing the state to present evidence of convictions secured subsequent to the indicted offense upon a retrial of the case, which evidence was introduced during the sentencing phase of the retrial; under this section, evidence of a conviction secured between the time of the capital offense and the time of trial is admissible to show aggravating circumstances. Nor was it error to use the same jury at both the guilt phase and the sentencing, since this section provides for the use of the same jury, and since there was no objection to the procedure or request for another jury to hear the sentencing phase. The sentence of death was not disproportionate to the penalty imposed in similar cases, considering the crime and the defendant, nor was it imposed under the influence of passion, prejudice, or any other arbitrary factors. Reddix v State (1980, Miss) 381 So 2d 999.

In the prosecution for the rape of a two-year-old female child, the failure of the defendant to receive a bifurcated trial on punishment and sentence did not constitute error where the defendant waived such a trial by failing to secure a ruling by the trial court, no objection was raised at the time of sentencing, and the state announced at the beginning of the trial that it would not seek the death penalty. Minor v State (1981, Miss) 396 So 2d 1031.

In a prosecution for capital murder committed during a robbery, the trial court erred when it instructed the jury that it was precluded from considering nonstatutory mitigating factors in determining whether to impose the death penalty. Washington v Watkins (1981, CA5 Miss) 655 F2d 1346.

In a prosecution for capital murder, the defendant was not entitled to separate juries for the guilt and sentencing phases of his trial; since the same jury tried both phases of the trial, the defendant was only entitled to 12 peremptory challenges rather than the 24 he requested. Tubbs v State (1981, Miss) 402 So 2d 830.

## § 99-19-103. Instructions; aggravating circumstances shall be designated by jury in writing; effect of jury's failure to agree on punishment.

The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury, if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. Unless at least one (1) of the statutory aggravating circumstances enumerated in section 99-19-101 is so found or if it is found that any such aggravating circumstance is overcome by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life.

**SOURCES: Laws, 1977, ch. 458, § 3, eff from and after passage (approved April 13, 1977).**

**§ 99-19-105. Review by supreme court of imposition of death penalty.**

(1) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Mississippi Supreme Court. The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Mississippi Supreme Court together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Mississippi Supreme Court, a copy of which shall be served upon counsel for the state and counsel for the defendant.

(2) The Mississippi Supreme Court shall consider the punishment as well as any errors enumerated by way of appeal.

(3) With regard to the sentence, the court shall determine:

(a) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor;

(b) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 99-19-101; and

(c) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(4) Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(5) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(a) Affirm the sentence of death; or

(b) Set the sentence aside and remand the case for modification of the sentence to imprisonment for life.

(6) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

SOURCES: Laws, 1977, ch. 458, § 4, eff from and after passage (approved April 13, 1977).

Cross references—
As to criminal docket in supreme court, see § 9-3-21.

## JUDICIAL DECISIONS

The statutory provision allowing a jury in a capital murder prosecution to consider, on the issue of aggravating circumstances, whether "the capital offense was especially heinous, atrocious, or cruel," was not unconstitutionally vague; pursuant to the statute requiring appellate review of all death sentences, such a sentence would not be reversed where it was not imposed under the influence of passion, prejudice or any other arbitrary factor; where the evidence fully supported the jury's unanimous findings that two aggravating circumstances existed; where the death sentence was not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant; and where the jury carefully weighed the mitigating circumstances and found that they were insufficient to outweigh the two aggravating circumstances. Washington v State (1978, Miss) 361 So 2d 61, cert den 441 US 916, 60 L Ed 2d 388, 99 S Ct 2016.

The death penalty was properly imposed on defendant where, out of a desire to obtain money, he abducted his victim at gunpoint and fatally shot her when she tried to escape and where he then demanded and received a ransom from his victim's husband. Jordan v State (1978, Miss) 365 So 2d 1198, cert den 444 US 885, 62 L Ed 2d 114, 100 S Ct 175 and petition den (Miss) 390 So 2d 584.

In prosecution for the murder of a three-year-old girl, the circumstances in evidence amply supported a finding that the crime was especially heinous, atrocious and cruel and the jury was warranted, from the evidence before it, in finding that the aggravating circumstances outweighed any circumstance that might conceivably have been considered a mitigating circumstance; the death penalty was not imposed wantonly or freakishly or under the influence of passion, prejudice or any other arbitrary factor and was not excessive or disproportionate to similar cases in which such sentence had been imposed. Gray v State (1979, Miss) 375 So 2d 994, cert den 446 US 988, 64 L Ed 2d 847, 100 S Ct 2975, reh den (US) 65 L Ed 2d 1174, 101 S Ct 30.

In a prosecution for capital murder committed during a burglary, the death sentence would be reversed and the case remanded for sentencing to life imprisonment, where the victim, upon seeing defendant, began firing his pistol and was then shot by defendant, and where defendant had the opportunity to shoot the victim's wife but did not; the penalty of death in this case was disproportionate to the penalty imposed in similar cases. Coleman v State (1979, Miss) 378 So 2d 640.

In a prosecution for capital murder committed during an attempted robbery, the evidence supported the jury's finding of statutory aggravating circumstances, the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor, and the sentence of death was not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant; furthermore, prosecutorial discretion was not abused even though defendant's accomplice, who turned state's evidence, was permitted to plead guilty to manslaughter, while defendant, who fired the fatal shot, was given the death penalty. Culberson v State (1979, Miss) 379 So 2d 499.

In a prosecution for capital murder committed during a robbery, the sentence of death was not imposed by the jury under the influence of passion or prejudice, and the evidence supported

the jury's finding that the mitigating circumstances did not outweigh the aggravating circumstances (§ 99-19-101), where the evidence in mitigation of the sentence was that defendant was only 17 or 18 at the time of the offense, and that there was no testimony indicating that this codefendant had struck the blows causing death, where the jury found that the offense, committed during a robbery, was especially heinous and cruel, and that defendant had been previously convicted of a felony involving the use or threat of force, and where defendant himself offered no evidence in mitigation of the sentence. The sentence was not excessive or disproportionate to similar cases in which such sentence has been imposed. Jones v State (1980, Miss) 381 So 2d 983.

In a prosecution for capital murder committed in the course of a robbery wherein the victim was beaten to death by the defendant and an accomplice, the imposition of the death penalty was not excessive or disproportionate to the crime when compared to other crimes for which the death penalty has been imposed, despite the fact that the accomplice, whom the defendant described as the principal actor in the crime, received a sentence of life imprisonment from the jury which tried him. Bullock v State (1980, Miss) 391 So 2d 601, cert den 452 US 931, 69 L Ed 2d 432, 101 S Ct 3068.

## § 99-19-107. Life sentence to be imposed if death penalty held to be unconstitutional.

In the event the death penalty is held to be unconstitutional by the Mississippi Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death shall cause such person to be brought before the court and the court shall sentence such person to imprisonment for life, and such person shall not be eligible for parole.

SOURCES: Laws, 1977, ch. 458, § 5; 1982, ch. 431, § 6, eff from and after July 1, 1982.

# CHAPTER 21

## Fugitives From Other States

## § 99-21-1. Warrant for arrest of fugitives.

ALR Annotations—

Extradition of juveniles. 73 ALR3d 700.

Necessity that demanding state show probable cause to arrest fugitive in extradition proceedings. 90 ALR3d 1085.

Arrest and transportation of fugitive without extradition proceedings as violation of civil rights actionable under 42 USCS § 1983. 45 ALR Fed 872.

### JUDICIAL DECISIONS

In a habeas corpus challenge to the Mississippi governor's extradition of appellee to Missouri, despite a dispute regarding whether an accusatory affidavit was presented to the governor, the Missouri governor's warrant for appellee's arrest established prima facie basis for extradition and the appellee failed to prove its insufficiency. Taylor v Garrison (Miss) 329 So 2d 506.



§ 99-23-1. bond.

Editor's Note—
Ch. 471, Laws, replace justice of t with justice court ju 1972 affecting justi 471 did not specific § 171, amended 1 Mississippi Code to

§ 99-23-7.

Editor's Note—
Ch. 471, Laws, replace justice of th with justice court ju 1972 affecting justic 471 did not specific § 171, amended 1 Mississippi Code to

§ 99-23-13. justice cou court on ap

[Until January such earlier dat pursuant to § 9- parent volume.]

[From and aft county, from an justice court cler as follows:]

When the bon ($1,000.00), or exceed five hund justice court and at the instance of be, as nearly as court. Any such amount stated at court which requ the circuit court

[21 Miss Supp]

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT
OF HINDS COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

VS. NO. S-216

MICHAEL DALE LEATHERWOOD DEFENDANT

JURY INSTRUCTION NO. 1

Members of the Jury, you have heard all of the testimony and received the evidence and will shortly hear arguments of counsel. The Court will presently instruct you as to the rules of law which you will use and apply to this evidence in reaching your verdict. When you took your places in the jury box, you made an oath that you would follow and apply these rules of law to the evidence in reaching your verdict in this case. It is, therefore, your duty as jurors to follow the law which I shall now state to you. You are not to be concerned with the wisdom of any rule of law. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base your verdict upon any other view of the law than that given in these instructions by the Court.

You are not to single out one instruction alone as stating the law, but you must consider these instructions as a whole.

It is your exclusive province to determine the facts in this case and to consider and weigh the evidence for that purpose. The authority thus vested in you is not an arbitrary power, but must be exercised with sincere judgment, sound

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WM. E. "BILL" McKINLEY
CIRCUIT CLERK
By D.C.

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to you by the Court.

Both the State of Mississippi and the defendant have a right to expect that you will conscientiously consider and weigh the evidence and apply the law of the case.

It is your duty to determine the facts and to determine them from the evidence produced in open court. You are to apply the law to the facts, and in this way decide the case. You should not be influenced by bias, sympathy or prejudice. Your verdict should be based on the evidence and not upon speculation, guesswork or conjecture.

You are required and expected to use your good common sense and sound honest judgment in considering and weighing the testimony of each witness who has testified in this case.

The evidence which you are to consider consists of the testimony and statements of the witnesses and the exhibits offered and received. You are also permitted to draw such reasonable inferences from the evidence as seem justified in the light of your own experience.

Arguments, statements and remarks of counsel are intended to help you understand the evidence and apply the law, but are not evidence. If any argument, statement or remark has no basis in the evidence, then you should disregard that argument, statement or remark.

The production of evidence in court is governed by rules of law. From time to time during the trial, it has been my duty as judge to rule on the admissibility of evidence. You must not concern yourselves with the reasons for the Court's rulings since they are controlled and governed by rules of law. You should not infer from any rulings by the

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By _____ D. C.

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Court on these motions or objections to the evidence that the Court has any opinion on the merits favoring one side or the other. You should not speculate as to possible answers to questions which the Court did not require to be answered. Further, you should not draw any inference from the content of these questions. You are to disregard all evidence which was excluded by the Court from consideration during the course of the trial.

If in stating the law to you I repeat any rule, direction or idea, or if I state the same in varying ways, no emphasis is intended and you must not draw any inference therefrom. The order in which these instructions are given has no significance as to their relative importance.

WM. E. "BILL" McKINLEY
CLERK
By D. C.

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT
OF HINDS COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

VS. NO. S-216

MICHAEL DALE LEATHERWOOD DEFENDANT

JURY INSTRUCTION NO. 2

The defendant has pled guilty to the crime of "Capital Murder". You must now decide whether the defendant will be sentenced to death or to life imprisonment. In reaching your decision, you must objectively consider the detailed circumstances of the offense for which the defendant was convicted, and the defendant himself.

To return the death penalty, you must unanimously find from the evidence, beyond a reasonable doubt, that aggravating circumstances - those which tend to justify the death penalty- out-weigh mitigating circumstances - those which tend to justify the less severe penalty of life imprisonment.

If you unanimously find from the evidence in this case, beyond a reasonable doubt, any of the following aggravating circumstances:

1. The Capital Murder was committed while the defendant was engaged in the commission of robbery;

2. The Capital Murder was committed for pecuniary gain;

3. The Capital Murder was especially heinous, atrocious or cruel;

4. The Capital Murder was committed for the purpose of avoiding a lawful arrest;

5. The defendant was previously convicted of a felony involving the use or threat of violence to the person;

then you must proceed to weigh the aggravating circumstances and the mitigating circumstances, one against the other, to determine whether the aggravating circumstances, if any, out-weigh the mitigating circumstances.



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The mitigating circumstances which you may consider include the following:

1. The age of the defendant at the time of the crime.

2. Any and all other matters, facts and circumstances which you as jurors may consider from the evidence as mitigating.

3. Any circumstance or combination of circumstances surrounding the defendant's life and character which reasonable mitigates against impositon of the death penalty.

4. Whether the defendant has no significant history of prior criminal activity.

5. Whether the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

6. Whether the defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor.

7. Whether the defendant acted under extreme duress or under the substantial domination of another person.

8. Whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

If you unanimously find from the evidence, beyond a reasonable doubt, any one or more of the aggravating circumstances listed above, and, if, after weighing the mitigating circumstances and the aggravating circumstances, one against the other, you further find unanimously from the evidence beyond a reasonable doubt that the aggravating circumstances out-weigh the mitigating circumstances and the death penalty should be imposed, your verdict shall be written on a separate sheet of paper, shall be signed by your foreman, and shall be in the following form:

"We, the Jury, find unanimously and beyond a reasonable doubt the following aggravating circumstances: (List the aggravating circumstances, if any, which you unanimously find beyond a reasonable doubt from those listed above in the same language as they are listed.) We, the Jury further find unanimously from the evidence and beyond a reasonable doubt that after weighing the mitigating circumstances and the aggravating

circumstances, one against the other, that the aggravating circumstances do out-weigh the mitigating circumstances and t[redacted]

[redacted] and that the defendant should suffer the penalty of death.

FOREMAN OF THE JURY

If you fail to find any aggravating circumstances unanimously and beyond a reasonable doubt, or if you find one or more aggravating circumstances, but after weighing the aggravating and mitigating circumstances, one against the other, you fail to unanimously find, beyond a reasonable doubt, that the aggravating circumstances out-weigh the mitigating circumstances, then your verdict shall be in the following form:

"We, the Jury, find the Defendant should be sentenced to imprisonment for life in the state penitentiary."

If, after reasonable deliberation, you cannot agree as to the punishment, you should certify your disagreement to the Court and the Court shall, under the law, impose a sentence of imprisonment for life. Your verdict shall be in the following form:

"We, the Jury, after due deliberation, have been unable to agree upon the punishment and hereby so certify and request the Court to dismiss the Jury from further deliberation."

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT

OF HINDS COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

VS. NO. S-216

MICHAEL DALE LEATHERWOOD DEFENDANT

JURY INSTRUCTION NO. 3

The Court instructs the jury that if you fail to find any aggravating circumstance unanimously and beyond a reasonable doubt, or, if you find one or more aggravating circumstances unanimously and beyond a reasonable doubt, but after weighing the mitigating circumstances and the aggravating circumstances, one against the other, you fail to unanimously find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances, then your verdict shall be written on a separate piece of paper and be in the following form:

> "We, the jury, find that the defendant should be sentenced to imprisonment for life in the state penitentiary".

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT

OF HINDS COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

VS. NO. S-216

MICHAEL DALE LEATHERWOOD DEFENDANT

JURY INSTRUCTION NO. 4

I have previously read to you the list of aggravating circumstances which the law permits you to consider if you find that any of them is established by the evidence. These are the only aggravating circumstances that you may consider. You are not allowed to take account of any other facts or circumstances as the basis for deciding that the death penalty would be an appropriate punishment in this case.

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IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT

OF HINDS COUNTY, MISSISSIPPI

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STATE OF MISSISSIPPI

VS. NO. 5-216

MICHAEL DALE LEATHERWOOD DEFENDANT

JURY INSTRUCTION NO. ~~20~~ 5

The court instructs the jury that mitigating circumstances are those which do not constitute a justification or excuse for the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability or blame.

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT

OF HINDS COUNTY, MISSISSIPPI



STATE OF MISSISSIPPI

VS. NO. S-216

MICHAEL DALE LEATHERWOOD DEFENDANT

JURY INSTRUCTION NO. 26

In arriving at a sentence in this case, you must not act in reliance on the granting of clemency or leniency by any higher court. You must adjudge a sentence that you, in examining the dictates of your individual consciences, the evidence produced, and the instructions of this court, believe that the defendant should serve. If it is your unanimous decision to impose the penalty of death, each of you must do so with the fixed assumption in your own mind that the sentence of death will be carried out.

SURVEY OF STATE BALANCING STATUTES
WITH DUPLICATIVE AGGRAVATING CIRCUMSTANCES

A. The following states have balancing death penalty statutes:

Alabama

Ala. Code § 13A-5-46(e) (1982)

Arizona

Ariz. Rev. Stat. Ann. § 13-703E (1983 pocket part)

Arkansas

Ark. Stat. Ann. § 41-1302 (1977)

California

Cal. Penal Code § 190.3 (West 1983 Supp.)

Delaware

Del. Code Ann. tit. 11, § 4209(d)(1)(b) (1979)

Florida

Fla. Stat. § 921.141(2)(6) (1983 cum. pocket part)

Idaho

Idaho Code § 19-2515(b) (1979)

Illinois

Ill. Ann. Stat. ch. 38, ¶ 9-1(g) (Smith-Hurd 1983 cum. pocket part)

Indiana

Ind. Code Ann. § 35-50-2-9 (Burns 1979)

Kentucky

Ky. Rev. Stat. Ann. § 532.025(b) (Bobbs-Merrill 1982 cum. pocket part)

Louisiana

La. Code Crim. Proc. Ann. art. 905.3 (West 1982 Supp.)

Maryland

Md. Ann. Code art. 27, § 413(h) (1982)

Massachusetts

Mass. Ann. Laws ch. 279, § 68 (Michie/Law. Co-op. 1983 Supp.)

Mississippi

Miss. Code Ann. § 99-19-101(b) (1982 Supp.)

Missouri

Mo. Ann. Stat. § 565.012.1(4) (Vernon 1983 cum. pocket part)

Montana

Mont. Code Ann. § 46-18-305 (1981)

Nebraska

Neb. Rev. Stat. § 29-2522 (1982 Supp.)

Nevada

Nev. Rev. Stat. § 200.033 (1977)

New Hampshire

N.H. Rev. Stat. Ann. § 630.5(IV) (1981 Supp.)

New Jersey

N.J. Stat. Ann. § 2C:11-3 (West 1982)

New Mexico

N.M. Stat. Ann. § 31-20A-2(b) (1982 Supp.)

North Carolina

N.C. Gen. Stat. § 15A-2000(e)(3) (1978)

Ohio

Ohio Rev. Code Ann. § 2929.03(2) (Page 1982)

Oklahoma

Okla. Stat. Ann. tit. 21, § 701.10 (West 1983)

Pennsylvania

42 Pa. Cons. Stat. Ann. § 9711(c)(iv) (Purdon 1982)

South Carolina

S.C. Code Ann. § 16-3-20(C) (Law. Co-op. 1982 Supp.)

South Dakota

S.D. Codified Laws Ann. § 23A-27A-1 (1982 Supp.)

Tennessee

Tenn. Code Ann. § 39-2-203(g) (1982)

Utah

Utah Code Ann. § 76-3-207(2) (1978)

Wyoming

Wyo. Stat. § 6-2-102(d)(i) (1983)

B. The following states have balancing death penalty statutes which contain aggravating factors of the "commission of robbery" and "pecuniary gain" type:

Alabama

Ala. Code § 13A-5-49(4) (1982) ("robbery")

Ala. Code § 13A-5-49(6) (1982) ("pecuniary gain")

The Alabama Supreme Court has refused to allow cumulation of these two aggravating factors. See Cook v. State, 369 So.2d 125 (Ala. 1978).

California

Cal. Penal Code § 190.2(17)(i) (1983 Supp.) ("robbery")

Cal. Penal Code § 190.2(1) (1983 Supp.) ("financial gain")

Delaware

Del. Code Ann. tit. 11, § 4209(e)(1)(j) (1979) ("robbery")

Del. Code Ann. tit. 11, § 4209(e)(1)(o) (1982 Cum. Supp.) ("pecuniary gain")

Kentucky

Ky. Rev. Stat. Ann. § 532.025(2)(a)(2) (Bobbs-Merrill 1982 Cum. Supp.) ("robbery")

Ky. Rev. Stat. Ann. § 532.025(2)(a)(4) (Bobbs-Merrill 1982 Cum. Supp.) ("for the purpose of receiving money")

Mississippi

Miss. Code Ann. § 99-19-101(d) (1982 Cum. Supp.) ("robbery")

Miss. Code Ann. § 99-19-101(f) (1982 Cum. Supp.) ("pecuniary gain")

Nevada

Nev. Rev. Stat. § 200.033(4) (1977) ("robbery")

Nev. Rev. Stat. § 200.033(6) (1977) ("for the purpose of receiving money")

North Carolina

N.C. Gen. Stat. § 15A-2000(e)(5) (1979 Supp.) ("robbery")

N.C. Gen. Stat. § 15A-2000(e)(6) (1979 Supp.) ("pecuniary gain")

The North Carolina Supreme Court has refused to allow cumulation of these two aggravating factors. See State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979).

South Carolina

S.C. Code Ann. § 16-3-20(C)(a)(1) (Law. Co-op. 1982 Supp.) ("robbery")

S.C. Code Ann. § 16-3-20(C)(a)(4) (Law. Co-op. 1982 Supp.) ("for the purpose of receiving money")

Utah

Utah Code Ann. § 76-5-202(d) (1978) ("robbery")

Utah Code Ann. § 76-5-202(f) (1978) ("pecuniary gain")

Wyoming

Wyo. Stat. § 6-2-102(h)(iv)(1983) "robbery"

Wyo. Stat. § 6-2-102(h)(vi)(1983) "pecuniary gain"

C. Other examples of duplicative aggravating circumstances:

Florida

Fla. Stat. § 921.141(5)(e) (1983 cum. pocket part) ("avoiding . . . arrest")

Fla. Stat. § 921.141(5)(g) (1983 cum. pocket part) ("disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws")

Indiana

Ind. Code Ann. § 35-50-2-9(7) (Burns 1979) ("convicted of another murder")

Ind. Code Ann. § 35-50-2-9(8) (Burns 1979) ("committed another murder")

Louisiana

La. Code Crim. Proc. Ann. art. 905.4(b) (West 1983 Supp.) ("peace officer"--defined to include correctional guard)

La. Code Crim. Proc. Ann. art. 905.4(i) (West 1983 Supp.) ("correctional officer")

ANALYSIS OF
POST-1977 MISSISSIPPI DEATH PENALTY CASES

| CASE | AGGRAVATING (Statutory) | CIRCUMSTANCES (Non-Statutory) | MITIGATING (Statutory) | EVIDENCE * (Non-Statutory) | MISSISSIPPI SUPREME COURT RULING |
|---|---|---|---|---|---|
| Bell v. State<br>360 So.2d 1206<br>(Miss. 1978) | 1) murder committed in course of burglary/kidnapping<br>2) heinous, cruel or atrocious<br>3) murder for pecuniary gain | - prior criminal record (2 robberies, 2 burglaries, 1 assault with intent to kill, 1 capital murder)<br>- D showed no remorse | - substantial impairment (D had taken marijuana; other drugs)<br>- D was accomplice only and had asked co-participant not to kill victim<br>- age (17 or 18) | | Affirmed<br>(See also Bell v. Watkins, 692 F.2d 999 (5th Cir. 1982) (death sentence vacated on the grounds of improper jury instructions on aggravating circumstance |
| Irving v. State<br>361 So. 2d 1360<br>(Miss. 1978) | 1) murder committed in course of robbery. Unclear if any other aggravating circumstances found. | - prior criminal record (1 burglary)<br>- triggerman | - age (20) | | Affirmed<br>(See also Irving v. Hargett 518 F. Supp. 1127 (D. Miss. 1981) (death sentence vacated on the grounds of ineffective assistance of counsel) |
| Washington v. State<br>361 So.2d 161<br>(Miss. 1978) | 1) murder committed in course of robbery<br>2) heinous, cruel or atrocious | - prior criminal record (possession of marijuana)<br>- triggerman | - age (23)<br>- D had no significant history of prior criminal activity | - D had 3 yr old daughter | Affirmed |
| Voyles v. State<br>362 So.2d 1236<br>(Miss. 1978) | 1) murder committed in course of robbery<br>2) murder committed for pecuniary gain<br>3) heinous, cruel or atrocious | - triggerman | | No mitigating evidence offered | |

*/ The mitigating factors enumerated are those discussed in the Mississippi Supreme Court's decision; however, since the jury in Mississippi is not required to make written findings on mitigating evidence, it is unclear which mitigating circumstances, if any, were established.

| CASE | AGGRAVATING (Statutory) | CIRCUMSTANCES (Non-Statutory) | MITIGATING (Statutory) | EVIDENCE (Non-Statutory) | MISSISSIPPI SUPREME COURT RULING |
|---|---|---|---|---|---|
| Jordan v. State<br>365 So.2d 1198<br>(Miss. 1978) | 1) murder committed in course of kidnapping. Unclear if any other aggravating circumstances found. | - triggerman | - record revealed no prior criminal activity | - good reputation<br>- good relationship with parents<br>- D had sought forgiveness from God | Affirmed<br>(See also Jordan v. Watkin 681 F.2d 1067 (5th Cir. 19 (death sentence vacated on the grounds of improper jury instructions on aggravating circumstances) |
| Coleman v. State<br>378 So. 2d 640<br>(Miss. 1978) | 1) murder committed in course of burglary | - triggerman | - age (16)<br>- emotional disturbance at time of shooting | - Victim fired first;<br>- D had opportunity to kill victim's wife but did not shoot. | Reversed -- death sentence disproportionate because victim fired first at D |
| Gray v. Lucas<br>375 So.2d 994<br>(Miss. 1978) | 1) murder committed while D under sentence of life imprisonment<br>2) murder committed in course of kidnapping<br>3) murder committed for purpose of lawful arrest<br>4) heinous, cruel or atrocious | - brutal murder of 3 yr old child;<br>- prior criminal record (murder)<br>- triggerman | Mental disturbance. Gray had personality disorder | | Affirmed<br>(D executed) |
| Culberson v. State<br>379 So.2d 499<br>(Miss. 1979) | 1) murder committed during course of robbery<br>2) heinous, cruel or atrocious<br>3) D previously convicted of felonies involving threat of violence to person | - prior criminal record (armed robbery, assault w/ intent to kill)<br>- triggerman | | | Affirmed |

| CASE | AGGRAVATING (Statutory) | CIRCUMSTANCES (Non-Statutory) | MITIGATING (Statutory) | EVIDENCE (Non-Statutory) | MISSISSIPPI SUPREME COURT RULING |
|---|---|---|---|---|---|
| Jones v. State 381 So.2d 983 (Miss. 1980) | 1) murder committed in course of robbery<br>2) heinous, cruel or atrocious<br>3) D previously convicted of felony involving threat of violence to the person (armed robbery) | | - age (17 or 18)<br>- minor role in the murder because it was not clear if accomplice or D struck the blows<br>- (dissent noted that trial judge's report included D age and borderline mental capacity) | | Affirmed<br>See also Jones v. Thigpen, 555 F.Supp. 870 (S.D.Miss. 1983) (death sentence vacated under Enmund v. Florida, ___ U.S. ___, 102 S.Ct. 3368 (1982). |
| Reddix v. State 381 So.2d 999 (Miss. 1980) | 1) murder committed in course of robbery<br>2) heinous, cruel or atrocious<br>3) D previously convicted of felony involving threat of violence to the person (2 armed robberies; 2 kidnappings) | | - age (18)<br>- minor role in murder because accomplice delivered fatal blows | - 8th grade education<br>- reputation for peace in jail | Affirmed<br>See also Beddix v. Thigpen, 554 F.Supp. 1212 (S.D.Miss. 1983) (death sentence vacated under Enmund v. Florida, ___ U.S. ___, 102 S.Ct. 3368 (1982). |
| Bullock v. State 391 So.2d 601 (Miss. 1980) | 1) murder committed in course of robbery. Unclear if other aggravating circumstances found | | Minor role in murder because accomplice beat victim. | D argued since the triggerman got life, he should not receive greater sentence | Affirmed |

| CASE | AGGRAVATING (Statutory) | CIRCUMSTANCES (Non-Statutory) | MITIGATING (Statutory) | EVIDENCE (Non-Statutory) | MISSISSIPPI SUPREME COURT RULING |
|---|---|---|---|---|---|
| Johnson v. State<br>416 So.2d 383<br>(Miss. 1982) | 1) murder committed in course of burglary<br>2) murder committed to escape a lawful arrest (victim was police officer)<br>3) heinous, cruel or atrocious | - D showed no remorse<br>- triggerman | - age (19)<br>- no history of prior criminal activity | | Affirmed |
| Edwards v. State<br>413 So.2d 1007<br>(Miss. 1982) | 1) murder committed in course of robbery. Unclear if any other aggravating circumstances found. | - triggerman<br>- prior criminal record (D had long history of criminal convictions, including a capital murder conviction committed during the same week.)<br>- D was escapee from prison at the time of the offense | | | Affirmed |
| Smith v. State<br>419 So.2d 563<br>(Miss. 1982) | 1) murder committed in course of robbery<br>2) murder committed for pecuniary gain<br>3) heinous, cruel or atrocious | - prior criminal record (disorderly conduct and resisting arrest)<br>- triggerman<br>- D had fired deadly weapon on 2 separate occasions | - age (23)<br>- lack of significant history of criminal activity (at the time of trial) | - employment record<br>- character witnesses had high opinion of D | Affirmed |

| CASE | AGGRAVATING CIRCUMSTANCES (Statutory) | (Non-Statutory) | MITIGATING (Statutory) | EVIDENCE (Non-Statutory) | MISSISSIPPI SUPREME COURT RULING |
|---|---|---|---|---|---|
| Wheat v. State 420 So.2d 229 (Miss. 1982) | 1) murder committed in course of robbery<br>2) cruel & atrocious<br>3) D previously convicted of 3 felonies (second degree murder, assult with weapon and false imprisonment) | - triggerman | | No mitigating evidence offered. | Affirmed |
| King v. State 421 So.2d 1009 (Miss. 1982) | 1) murder committed in course of burglary<br>2) heinous, cruel or atrocious | | - age (jury instructed to consider age, but age not known) | - D testified victim alive when he last saw her. | Affirmed |
| Evans v. State 422 So.2d 737 (Miss. 1982) | 1) murder committed in course of robbery<br>2) murder committed to avoid lawful arrest<br>3) cruel & atrocious<br>4) murder committed while D under sentence of imprisonment. | - prior criminal record<br>- triggerman | - age (21) | - D testified he was sorry<br>- D pled guilty | Affirmed |

| CASE | AGGRAVATING CIRCUMSTANCES (Statutory) | (Non-Statutory) | MITIGATING (Statutory) | EVIDENCE (Non-Statutory) | MISSISSIPPI SUPREME COURT RULING |
|---|---|---|---|---|---|
| Gilliard v. State<br>428 So.2d 576<br>(Miss. 1983) | 1) murder committed in course of robbery<br>2) murder committed for pecuniary gain<br>3) heinous, cruel or atrocious<br>4) D previously convicted of a felony offense involving a threat of violence | - triggerman | - Court upheld trial judge's refusal to permit jury to consider statutory mitigating circumstance that D acted under substantial domination of his accomplice because this subject was covered under a more general instruction regarding D's character. | - D 1 of 11 children<br>- dropped out of school at age 14 to support his family<br>- drinking problem<br>- below average intelligence<br>- easily influenced<br>- D pled guilty | Affirmed |
| Pruett v. State<br>431 So.2d 1101<br>(Miss. 1983) | 1) murder committed in course of kidnapping. Not clear if other aggravating circumstances found. D apparently was convicted of prior murders and armed robberies. | - triggerman<br>- D stated he would escape from prison and hurt anyone who got in his way | - substantial impairment (D used cocaine during murder) | - D a Christian | Affirmed |
| Edwards v. State<br>No. 53,800<br>(Miss. Mar. 16, 1983) | 1) murder committed to disrupt enforcement of laws<br>2) heinous, cruel or atrocious | - triggerman<br>- trial judge held that Edwards was an habitual criminal | - D under influence of extreme emotional disturbance;<br>- capacity of D to appreciate criminality of his conduct substantially impaired | - D alcoholic | Reversed (per curiam) -- sentenced to life because jury should have been instructed peremptorily that the facts established the two statutory mitigating circumstances |

No. 83-5767 (A)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

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Michael Dale Leatherwood,

Petitioner,

v.

The State of Mississippi,

Respondent.

---

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, by and through his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to the Supreme Court of the State of Mississippi without prepayment of costs and to proceed in forma pauperis, pursuant to Rule 46 of the Rules of this Court.*/

Petitioner's Affidavit in support of this motion is attached hereto as "Exhibit A."

Respectfully submitted,

Michael Sandler
Michael C. Miller
Felice Busto
STEPTOE & JOHNSON
CHARTERED
1250 Connecticut Avenue, N. W.
Washington, D. C. 20036
(202) 862-2000

Counsel for Petitioner
Michael Dale Leatherwood

---

*/ A motion for leave to proceed in forma pauperis has not been filed in any court below.

AFFIDAVIT

I, MICHAEL-DALE LEATHERWOOD, being first duly sworn according to law, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said case or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? NO

(a) If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

(b) If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

AUGUST 29, 1980

422.25 PER MONTH SALARY

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other source?

NO

(a) If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings accounts?

NO

(a) If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)?

NO

(a) If the answer is yes, describe the property and state its approximate value.

4. (continued)

5. List the persons who are dependent upon you for support and state your relationship to those persons.

NONE

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Michael-Dale Leatherwood

Subscribed and Sworn to Before me this 12th day of July, 1983.

Notary Public

My Commission Expires May 6, 1985

83-5767



NO._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

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MICHAEL DALE LEATHERWOOD,
Petitioner,

v.

STATEMENT OF MISSISSIPPI,
Respondent.

---

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MISSISSIPPI

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BRIEF IN OPPOSITION

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EDWIN LLOYD PITTMAN, ATTORNEY GENERAL

BY: CAROLYN B. MILLS
SPECIAL ASSISTANT ATTORNEY GENERAL

Post Office Box 220
Jackson, Mississippi 39205
(601) 359-3680

## QUESTIONS PRESENTED

1. Did the lower court err in allowing the jury to consider that the Capital offence was committed while the Petitioner was engaged in the commission of a robbery, and that the capital offense was committed for pecuniary gain; Does this practice amount to "Doubling Up" of aggravating circumstances?

2. Does the finding of "especially heinous, atrocious or cruel" establish an undefined death sentencing standard?

3. Is Petitioner's arguemnt procedurally barred because it was not raised in the lower court?

4. Is the death penalty being disproportionately imposed in the case at bar?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

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MICHAEL DALE LEATHERWOOD,
Petitioner,

v.

STATE OF MISSISSIPPI,
Respondent.

---

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MISSISSIPPI

---

BRIEF IN OPPOSITION

---

Respondent, State of Mississippi, respectfully prays that the Petition for Writ of Certiorari to the Supreme Court of Mississippi be denied in this case.

## Opinion Below

The opinion of the Supreme Court of Mississippi is reported as Michael Dale Leatherwood v. State of Mississippi, 435 So.2d 645 (Miss. 1983). A copy of the opinion is before the Court as Appendix A to the Petition for Writ of Certiorari.

## Jurisdiction

Petitioner seeks to invoke the jurisdiction of this Court by way of a Petition for Writ of Certiorari through the authority of 28 U.S.C. 1257(3). He had failed to do so.

## Constitutional Provisions Invoked

Petitioner seeks to invoke the provisions of the Constitution of the United States, Amendment VIII. This case also involves Sections 99-19-101, 103, 105 and 107, Mississippi Code of 1972 Annotated.

## Statement of the Case

Petitioner, Michael Dale Leatherwood, was indicted for the crime of Capital Murder by the grand jury of the First Judicial District of Hinds County, Mississippi during the November, 1980 Term. The indictment grew out of the August 22, 1980 slaying of Albert Taylor.

Petitioner pled guilty during the December 1981 Term of the Hinds County Circuit Court. After the guilty plea the trial continued into the sentencing stage. After hearing testimony and arguments of counsel the jury retired to consider sentence. After deliberation the jury returned a sentence of death in the proper form.

On automatic review to the Mississippi Supreme Court the sentence of death was affirmed by the Court on May 25, 1983 Leatherwood v. State, 435 So.2d 645 (1983). A petition for rehearing was denied on August 17, 1983 without written opinion.

The facts as reflected by the record show that on August 22, 1980, Jerry Fuson, George Tokman, and the Petitioner Leatherwood left Fort Polk, Louisiana, for Jackson, Mississippi, in the Petitioner's car to pick up Fuson's car which had been left in Jackson a week earlier. Fuson agreed to pay all expenses in return for the Petitioner driving him to Jackson. After they retrieved the car, Fuson revealed that he had only ten dollars for gas money for the two cars to return to Fort Polk, which was insufficient. George Tokman devised a scheme to rob a cab driver and Fuson helped plan the details "like a military operation." When the first cab answered the call, Tokman ignored the driver because he felt the driver was too young and strong. After a second call, the unfortunate victim, sixty-five year old Albert Taylor arrived and the trio entered the cab and Tokman gave Taylor an address. When the cab reached the address, Tokman requested the victim to turn off his lights because "he didn't want his parents to know he was coming in late." At this point

Petitioner Leatherwood slipped a rope around the victim's neck in order to subdue him. As the Petitioner tightened the rope, the victim was either pulled or started crawling over the back-seat. An autopsy report later showed that the victim's death was caused by intercranial bleeding suffered from blows to the head. There was conflicting testimony as to whether Petitioner told Tokman to "stab him." Tokman stabbed the victim three times in the head.

After driving the cab to a darkened alley behind a North Jackson shopping center, the trio robbed the victim of his wallet, two money bags, a flashlight, and a pistol. Later they returned to the scene of the crime after discovering that Petitioner had left his barricks' keys in the cab.

The trio netted approximately $11.00 in cash from the robbery and left Jackson early Sunday morning. Tokman cut his hand while stabbing the victim, so they stopped at a hospital in Vicksburg for medical treatment. While Tokman was in the emergency room, Petitioner and Fuson stole a man's wallet after surreptitiously gaining entry to his home and later used the victim's credit card for gas.

Thereafter, Petitioner and Tokman committed two robberies of Louisiana merchants within the next five days. Petitioner was subsequently tried and convicted for simple and armed robbery in Louisiana before his Mississippi capital murder trial.

## ARGUMENT

### PROPOSITION I.

THE LOWER COURT DID NOT ERR IN ALLOWING THE JURY TO CONSIDER THAT THE CAPITAL OFFENSE WAS COMMITTED WHILE THE PETITIONER WAS ENGAGED IN THE COMMISSION OF A ROBBERY, AND THAT THE CAPITAL OFFENSE WAS COMMITTED FOR PECUNIARY GAIN; IN THAT THIS PRACTICE DOES NOT AMOUNT TO AN IMPROPER "DOUBLING UP" OF AGGRAVATING CIRCUMSTANCES.

Respondent would show the jury herein found the following four aggravating circumstances:

> "We, the Jury, find unanimously and beyond a reasonable doubt the following aggravating circumstances:
>
> (1) The Capital Murder was committed while the defendant was engaged in the commission of robbery;
>
> (2) The Capital Murder was committed for pecuniary gain;
>
> (3) The Capital Murder was especially heinous, atrocious or cruel;
>
> (4) The Capital Murder was for the purpose of avoiding a lawful arrest.

Miss. Code Ann., § 99-19-101(2), poses three succinct inquires to be answered by the sentencing jury. The applicable portions of this code section are quoted as follows:

> (2) After hearing all the evidence, the jury jury shall deliberate on the following matters:
>
> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5) of this section;
>
> (b) Whether sufficient mitigating circumstances exist as enumerated in subsection (6) of this section, which outweigh the aggravating circumstances found to exist; and
>
> (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.
>
> (§ 99-19-101(2)(a)(b)(c).)

The jury may not go to inquiry number two [subsection (b)] unless and until inquiry number one [subsection (a)] is answered affirmatively. If inquiries number one and two are both answered "yes", the jury may yet impose a sentence of life imprisonment if it elects to do so. And the latter statement is true even if the

sole basis for the jury's imposition of the lesser sentence is simply that it likes the defendant's looks.

The penalty of death, however, may not be imposed until at least one (1) of the statutory aggravating circumstances enumerated in 99-19-101 is unanimously found beyond a reasonable doubt [the applicable standard] and until it also finds unanimously that there are insufficient mitigating circumstances. Section 99-19-103 is very clear on this point. It reads:

> The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury, if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. Unless at least one (1) of the statutory aggravating circumstances enumerated in section 99-19-101 is so found or if it is found that any such aggravating circumstance is overcome by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life.
>
> (Emphasis supplied)

The focal point of the jury's initial (1st) inquiry at the conclusion of the sentencing phase is whether or not any aggravating circumstances are present. This is true because at least one of the statutory aggravating circumstances enumerated in 99-19-101 must be found to exist beyond a reasonable doubt before the jury is authorized to even consider imposing the penalty of death.

There is no presumption implicit in our statutory scheme that a mere conviction of a substantive capital felony, e.g., robbery-murder, automatically and standing alone compels a finding of death unless the defendant adduces evidence in mitigation. Nothing in our statute says that a jury must impose the penalty of death in a factual sentencing environment where one or more aggravating factors are unanimously and beyond a reasonable doubt found to exist and no mitigating circumstances are forthcoming.

It may be that there is something about the appearance, age, attitude, and demeanor of the defendant that impresses the sentencing jury and convinces its members that the accused does not deserve to die. Or some particular mitigating aspect of the defendant's life history or the particular circumstances surrounding the offense may have been injected at trial during all the guilt phase. A jury, during the second phase, might well consider each of these facts in reaching its verdict although such are not specifically placed before it during the sentencing phase by defense counsel or instruction of the court below.

In other words, even in the complete absence of mitigating factors, a sentencing jury is not compelled legislatively to return a sentence of death no matter how many aggravating factors it has before it. Our statutory scheme is primarily designed and intended to inform the State what it must prove to grant to the sentencing jury the power to consider the imposition of the sentence of death and not what the defendant must do to show to the sentencer why his life should be spared. It devolves upon the defendant, once the State has met its burden, to move forward with whatever evidence in mitigation he may muster. This is not unlike the necessity at a trial for noncapital homicide of showing that one acted justifiably upon sufficient provocation or establishing that the homicide was excusable by virtue of accident or misfortune.

A defendant enters a criminal trial shielded by a presumption of innocence and, as we see it, he enters the sentencing phase of a death penalty case clothed with a so-called presumption of life. Each, however, is rebuttable and may be overcome by a quantum of proof. It does not follow that because a defendant in petitioner's posture enters the sentencing phase of a bifurcated trial for felony-murder with one strike against him, that he is predestined to "strike-out" in the batter's box.

Is not the killing of another while one is engaged in the commission of the crimes of robbery, rape, burglary, arson, kidnapping, aircraft piracy, or the unlawful use or detonation of a bomb or explosive devise [SEE: § 99-19-101(5)(d)], a circumstance of the offense and a patently aggravating one at that? Many states, and Mississippi is one of them, have a so-called felony-murder statute. [SEE: § 97-3-19(2)(e) (Supp. 1978)] The maximum punishment, pursuant to conviction for such an offense, is harsh because of the chronically severe and aggravated nature of the offense. There is nothing in the Federal or our State Constitution that prohibits a state legislature from enacting a law that prescribes as an aggravating circumstance for the sentencer's consideration in a death penalty case a homicide perpetrated in a so-called felony-murder factual environment.

In Mississippi the punishment of death is not mandatorily imposed upon the mere conviction of a capital felony-murder. Nothing compels the jury to impose the sentence of death upon its finding of one or more statutory aggravating circumstances regardless of the stage of the proceedings that they may come to light. The finding of one or more statutory aggravating circumstances simply authorizes the jury to consider the imposition of death.

The Fifth Circuit Court of Appeals recently addressed the same argument in Henry v. Wainwright, 721 F.2d 990 (1983). Therein the Court held in part:

> Henry next contends that various constitutional deficiencies in his sentencing proceeding rendered that proceeding unreliable, standardless, and arbitrary. See generally Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). First, Henry argues that reliance by the trial judge on the § (5)(d) aggravating circumstance, murder while committing robbery, resulted in the automatic imposition of the death penalty in his case. This argument has no merit. The sentencing authority clearly has discretion in deciding whether to impose the death penalty. See Barclay, 103 S.Ct. at 3431 (Stevens, J., concurring). It is certainly not unconstitutional for the state of Florida, in

constructing a death sentencing procedure, to consider murders committed in the course of other dangerous felonies to be reprehensible. Nor, as Henry argues, does the use of the underlying felony shift the burden of proof to the defendant: the state must nevertheless prove the existence of aggravating circumstances. The Supreme Court has held the Florida statute constitutional. See Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Henry raises no argument here that convinces us that this case is not controlled by Proffitt.

Second, Henry argues that the trial judge improperly regarded the aggravating circumstances of murder in the commission of a robbery and murder for pecuniary gain as separate and distinct aggravating circumstances in violation of Provence v. State, 337 So.2d 783 (Fla. 1976), cert. denied, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977). Henry's reading of Provence is correct as a matter of state law. We belive, however, that the decision of the Supreme Court in Barclay, ___U.S.___, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983), controls our resolution of this issue for the reasons set forth in section I, supra. The trial judge found no mitigating circumstances, and we cannot conclude that the state-law error by the trial judge raised the possibility that the death sentence in this case was not "imposed in a consistent rational manner." Id. 103 S.Ct. at 3429 (Stevens, J., concurring). The record gives no indication that the sentencing judge considered it important that the same facts supported two statutory provisions. We therefore reject Henry's claim on this ground.

Petitioner's argument is without merit and not persuasive.

## PROPOSITION II.

### A FINDING OF "ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL" DOES NOT ESTABLISH AN UNDEFINED DEATH SENTENCING STANDARD.

Petitioner attacks the eighth statutory aggravating circumstance of § 99-19-101(5)(h) Miss. Code Ann. (Supp. 1978), which authorizes the imposition of the death penalty if the "capital offense was especially heinous, atrocious or cruel."

Petitioner's argument was not raised at trial or on appeal to the Mississippi Supreme Court and therefore under the rationale of Webb v. Webb, 451 U.S. 493, 68 L.Ed.2d 392, 101 S.Ct. 1889 (1981) and Cardinale v. Louisiana, 394 U.S. 437, 22 L.Ed.2d 398, 89 S.Ct. 1162 (1969) this Court lacks jurisdiction to decide an issue that has never been presented to the state Courts or was not presented in a federal constitutional context to the state courts.

As held in Webb, supra:

> It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system. New York ex rel. Bryan v. Zimmerman, 278 U.S. 63, 67, 73 L.Ed. 184, 49 S.Ct. 61, 62 ALR 785 (1928); Oxley Stave Co. v. Butler County, 166 U.S. 648, 655, 41 L.Ed. 1149, 17 S.Ct. 709 (1897).
>
> It is appropriate to emphasize again, see Cardinale v. Louisiana, supra, at 439, 22 L.Ed.2d 398, 89 S.Ct. 1161, that there are powerful policy considerations underlying the statutory requirement and our own rule that the federal challenge to a state statute or other official act be presented first to the state courts. These considerations strongly indicate that we should apply this general principle with sufficient rigor to make reasonably certain that we entertain cases from state courts only where the record clearly shows that the federal issue has been properly raised below.
>
> (68 L.Ed.2d at 398)

If Petitioner had succeeded in invoking the jurisdiction of this Court, which he has not, his argument would have been without merit.

It must also be noted that the jury found that three other aggravating circumstances existed, i.e., the capital murder was committed while the defendant was engaged in the commission of robbery; the capital murder was for pecuniary gain; the capital murder was for the purpose of avoiding a lawful arrest.

In response to Petitioner's Argument regarding § 99-19-101 (5)(h) respondent would show that the identical question was raised in Edwards v. State, 441 So.2d 81 (Miss. 1984). Responding thereto, the Court held:

> Appellant contends that the facts as applied to the law of the case prohibited the granting by the court of an instruction authorizing the jury to find as an aggravating circumstance in the sentencing phase that "the capital offense was especially heinous, atrocious or cruel." There is a contention, among others, that the court should have gone further and instructed the jury that it was necessary for them to find appellant's act "conscienceless or pitiless . . . unnecessarily torturous to the victim," as discussed by this Court in Coleman v. State, 378 So.2d 640 (Miss. 1979). In answering this first contention, the record reveals that there was no request by the appellant for such an extra instruction and he is procedurally barred from raising that issue here. Newell v. State, 308 So.2d 71 (Miss. 1975). Regardless of this procedural bar, we do not find, as hereinafter discussed that the addition of these words was necessary even though they had been requested. In Washington v. State, 361 So.2d 61 (Miss. 1978), we stated as follows:
>
> > The facts in no two cases are exactly identical and no precise definition or formula can be made to cover every possible factual situation.
> >
> > It is our considered opinion that the average jury in its sound discretion and judgment understands the generally accepted meaning of the words "especially heinous, atrocious or cruel" and is able to apply these words to different factual situations without further definition of these words.

It is our opinion that these words are not unconstitutionally vague.

Appellant relies primarily on the case of Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). There a plurality of the court reversed the appellant's death sentence stating that the trial court erroneously authorized a jury to find aggravating circumstances under only one statutory provision: that the killing was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." George Code § 27-2534.1(5)(7). It should be noted at the outset that this was the only aggravating circumstance submitted to the jury by the trial court, although the Georgia statute provided for other aggravating circumstances, if applicable. An important distinguishing feature we shall discuss, which was relied on by the plurality when it said:

> [T]he jury imposed sentences of death on both of the murder convictions. As to each, the jury specified that the aggravating circumstances they had found beyond a reasonable doubt was that the offense of murder was outrageously or wantonly vile, horrible and inhuman.

The basis of the plurality opinion was that all murders could be said to be outrageous, or wantonly vile, horrible, and inhuman. We clearly do not have a situation in the case sub judice that confronted the widely divided court in Godfrey, supra. The Mississippi statute defining aggravating circumstances to be considered by the jury lists eight in number. In addition to "the capital offense was especially heinous, atrocious or cruel." [MCA § 99-19-101(5)(h), (Supp. 1980)1, the court in the case sub judice authorized the jury to find another aggravating circumstance, to-wit: "The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws." [MCA § 99-19-101(5)(g) (Supp. 1980)].

The evidence was undisputed that at the time appellant killed the deceased, the latter and his companion were dressed in police uniforms, had driven up in a plainly marked police department vehicle, and the area was lighted. Undisputedly, appellant was in a position to see clearly all of these circumstances.

As previously discussed under Godfrey, supra, the quoted language of the Georgia statute was the "only" aggravating circumstance presented for the jury's consideration. In the case sub judice, we have another equally important aggravating statutory circumstance that the jury not only easily could have found to be present, but would have been manifestly wrong in not considering that circumstance, as it was undisputed.

Appellant relies on the Louisiana Supreme Court case of State v. Sonnier, 402 So.2d 650 (La. 1981). It is noted that the Louisiana Court agreed with the plurality opinion in Godfrey regarding the aggravating circumstance of "especially heinous, atrocious or cruel." The Louisiana Court then went further and affirmed the conviction and death penalty for the reason that, as in the case sub judice, other statutory and aggravating circumstances were presented for the jury's consideration which amply supported the verdict. The Louisiana Court stated:

> There was no evidence that the male victim was subjected to any serious physical abuse, and the evidence may not be constitutionally sufficient to support a finding that the female was the victim of torture or the pitiless infliction of unnecessary pain.
>
> However, the evidence was clearly sufficient to support the jury's findings of four out of the five aggravating circumstances it listed. A majority of this Court has held that it knows of no constitutional requirements that a death sentence be vacated whenever the jury errs in only one of its findings of several statutory aggravating circumstances. State v. Monroe, 397 So.2d 1258 (La. 1981). Accordingly, the failure of one aggravating circumstance in this case does not so taint the proceedings as to invalidate the other aggravating circumstances found or the sentence of death.

The Supreme Court of Florida in Peek v. State, 395 So.2d 492 (Fla. 1980), recognized that even though one or more statutory aggravating circumstances were improperly submitted to the jury, the jury could consider other properly submitted aggravating circumstances without requiring a reversal of the case.

> Thus, we have two clearly valid aggravating circumstances, one contested but valid aggravating circumstance, and no mitigating circumstances. We find that the trial court's improper consideration of the two aggravating circumstances concerning pecuniary gain and commission of the offense while on probation does not render the sentence invalid.

In our opinion the above discussion regarding Godfrey, supra, as it applies to the case sub judice, is sufficent to affirm on the presently discussed assignment of error. We go further, however, and discuss aggravating circumstances (h), as it applies to the undisputed facts presented the jury during the trial, which record was introduced on the sentencing phase. Upon objection by appellant of the one aggravating circumstance of "especially heinous, atrocious and cruel", the trial court in overruling

the objection stated:

> Well, I find, in my opinion, the testimony shows that the deceased was shot with a shotgun with No. 6 shots at a distance that it would clearly cover the entire body and it was fired twice, once in one side while the victim was retreating and the second shot, which was the fatal shot, was fires while he was moving away from him. I feel that that is for the jury's consideration.

> The undisputed facts are that appellant deliberately aimed the shotgun at the deceased and fired two times in succession. The first blast of the shotgun hit the deceased in the side and the second hit the deceased in the back while he was attempting to retreat. A large number of pellets struck the body of the deceased over both his side and back. The deceased then called to his companion that he had been hit. After these occurrences, the deceased was conscious long enough to fire all six rounds from his .357 Magnum, Smith & Wesson, weapon in the direction of appellant. Certainly, there was a question for the jury as to whether or not deceased suffered physical agony and mental anguish. The testimony was certainly sufficient for the jury to find that the infliction of the wounds was "unnecessarily torturous" and was "pitiless". As stated in Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), "we feel that the term 'especially heinous, atrocious and cruel,' is a matter of common knowledge so that ordinary men would not have to guess at what was intended."

> In Godfrey, supra, not only was there just one aggravating circumstance submitted to the jury, there is the additional fact that both of the deceaseds were killed instantly. The crime was committed in the heat of passion, resulting from family difficulties. We find that the plurality opinion in Godfrey does not apply to the case sub judice. Even with this clear situation there were a number of dissenting opinions in Godfrey based on the facts of that particular case.

> We conclude that under the undisputed evidence in this case, the aggravating circumstance of "especially heinous, atrocious and cruel" was proper. In addition, and as a completely separate and distinct reason, we conclude that even though it had been improper, the fact that another undisputed aggravating circumstance was properly presented for the jury's consideration, requires that the case should be affirmed as to this assignment of error.

We are not, therefore, in accord with petitioner's assertion that the Supreme Court of Mississippi has never defined the

statutory language "especially heinous, atrocious, and cruel." It has on several occasions done so, albeit indirectly. The Court has characterized such killings as "wanton, willful, useless and cruel",[1] "brutish" and "brutal",[2] "senseless",[3] and "unprovoked."[4] Moreover, the Court has looked to the posture of the victim and the motive or purpose of the defendant in perpetrating his crime.[5] Such is not constitutionally impermissible but is a product of common sense.

Summarizing our response to this particular contention, we respectfully submit that § 99-19-101(5)(h) has not been applied so broadly as to create a "standardless and unchanneled imposition of death sentences." Godfrey v. Georgia, 446 U.S. 420, 64 L.Ed.2d 398, 100 S.Ct. 1759 (1980). Nor is there any compelling reason to think that such a result will occur in the future.

As to the actual demonstration before the jury, Respondent would show such was relevant to the question of whether the killing was done in an "especially heinous, atrocious or cruel manner."

Jerry Fuson testified that Petitioner "threw the rope around his neck and jerked him up and halfway over into the backseat" and held the rope around the victim's neck for several minutes. Fuson also testified that the victim still had a pulse, but Petitioner held the rope tight declaring that nobody could have lived through having that kind of jolt to his neck. It was within the jury's province to find this aggravating circumstance as instructed by the court. Petitioner's demonstration was not prejudicial.

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[1] SEE: Washington v. State, 361 So.2d at p. 67.

[2] SEE: Gray v. State, 375 So.2d at p. 1004.

[3] SEE: Culberson v. State, 379 So.2d at p. 510; Coleman v. State, 378 So.2d at p. 650.

[4] SEE: Culberson v. State, 379 So.2d at p. 510.

[5] SEE: Reddix v. State,

## PROPOSITION III.

### PETITIONER'S THIRD ASSIGNMENT OF ERROR IS PROCEDURALLY BARRED.

Petitioner now attempts to argue the trial court erred in refusing Defense Instructions 22 and 25. Petitioner seeks to invoke jurisdiction based on Justice Robertson dissent and the authority found in Gardner v. Florida, 430 U.S. 349, 361 (1977).

Respondent would show that in Gardner, supra, the State did not urge that the objection had been waived; however, Respondent herein strenuously objects to the requirements of Cardinale v. Louisiana, 394 U.S. 437, 22 L.Ed.2d 398, 89 S.Ct. 1162 (1969), being nullified. As set forth in Cardinale:

> It is a long settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system. (citations omitted).

Even if Petitioner had succeeded in invoking the jurisdiction of this Court, which he has not, his argument would have been without merit.

In Gray v. Lucas, 677 F.2d 1086 (1982), the United States Court of Appeals for the Fifth Circuit recently held:

> Fifth, Gray argues that once an aggravating factor is established by the state, the burden of proof is impermissibly shifted to the defendant. Gray contends that to avoid the death penalty, the defendant must show that the mitigating factors outweigh the aggravating factors. Gray argues that this allocation of proof creates an unconstitutional presumption of death.
>
> Gray's argument, however, is based on a misapprehension of the applicable state law. Section 99-19-103 of the Mississippi Code provides that the jury may not impose the death penalty unless it finds that at least one statutory aggravating circumstance exists and that the aggravating circumstances are not outweighed by the mitigating circumstances. See Miss. Code Ann. § 99-19-103. The burden of proving an aggravating circumstance

> exists as part of the prosecution's general bundle. Gray v. State, 351 So.2d 1342, 1345 (Miss. 1977) (appeal from Gray's first trial). The defendant is permitted but not required to offer any relevant mitigating circumstances not encompassed in the prosecutor's presentation. No burden of proof or persuasion is assigned, just as the defendant's option to develop proof of alibi, good character, or, in this case, mental instability does not operate to shift the burden of proof, so the choice to present any number or kind of mitigating circumstances does not. Moreover, even if the jury finds that the aggravating circumstances outweigh the mitigating circumstances, it is not required to impose the death penalty. It may still sentence a defendant to life imprisonment. See Coleman v. State, 378 So.2d 640, 647 (Miss. 1979). Thus, the statutory procedures act only to require the prosecution to build the aggravating circumstance bridge the jury must cross to be entitled to impose the death penalty. Cf. Stephens v. Zant, —— U.S. ——, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1982). They do not limit its ability to impose a life sentence. Every mandatory element of proof is assigned to the prosecution. Neither the burden of production nor the burden of proof ever shifts to the defendant.

Petitioner's argument is not properly before this Court nevertheless it is clearly without merit.

## PROPOSITION IV.

## THE PENALTY OF DEATH IS NOT DISPROPORTIONATE TO THE PENALTY IMPOSED IN SIMILAR CASES.

This Court on January 23, 1984 addressed the issue of sentence proportionality in Pulley v. Harris, 52 U.S.L.W. 4141 (U.S. Jan. 23, 1984), reversed and remanded, 692 F.2d 1189 (9th Cir. 1982). Therein this Court held as follows:

> There is thus no basis in our cases for holding that comparative proportionality review by an appellate court is required in every case in which the death penalty is imposed and the defendant request it. Indeed, to so hold would effectively overrule Jurek and would substantially depart from the sense of Gregg and Proffitt. We are not persuaded that the Eighth Amendment requires us to take that course.

Respondent would nevertheless submit that the death sentence for the capital murder committed during the robbery by Petitioner was not disproportionate to the penalty imposed in similar cases. All the aggravating and mitigating circumstances were presented to the jury and it cannot be said that the death sentence is excessive in this light. By reviewing the record and comparing it to each of the other decisions upholding death penalties in robbery-murder cases we are confident that this Court will conclude as we do.

In the death penalty decision of King v. State, 421 So.2d 1009 (Miss. 1982), this Court attached as Appendix "A" a comprehensive list of death cases affirmed to date by this Court. Ten (10) of those cases involved murders while the defendants were engaged in the commission of robbery, viz., Smith, Edwards, Bullock, Reddix, Jones, Culberson, Voyles, Irving, Washington, and Bell [citations omitted]. The cases of Wheat v. State, 420 So.2d 229 (Miss. 1982); and Evans v. State, 422 So.2d 737 (Miss. 1982), also be added to that list.

Respondent would show the death sentence rendered herein is consistent with the cases as listed above and is not disproportionate in light of the aggravating circumstances.

## CONCLUSION

For the reasons stated above the Petition for Writ of Certiorari to the Supreme Court of Mississippi should be dismissed.

Respectfully submitted,
EDWIN LLOYD PITTMAN, ATTORNEY GENERAL

Carolyn B. Mills

BY: CAROLYN B. MILLS
SEPCIAL ASSISTANT ATTORNEY GENERAL

## CERTIFICATE

I, Carolyn B. Mills, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a copy of the foregoing Petition For Writ Of Certiorari to the Supreme Court of the State of Mississippi and Brief In Opposition to Honorable Michale Sandler, STEPTOE & JOHNSON, Chartered, 1250 Connecticut Avenue, N.W., Washington, D.C. 20036.

This, the 10th day of February, A.D., 1984.

Carolyn B. Mills
SPECIAL ASSISTANT ATTORNEY GENERAL

No. 83-5767

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

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MICHAEL DALE LEATHERWOOD,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

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PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MISSISSIPPI

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# REPLY BRIEF

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ATTORNEYS FOR PETITIONER

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PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MISSISSIPPI

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REPLY BRIEF

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1. Petitioner contends that the duplication of "robbery" and "pecuniary gain" as separate aggravating factors supporting his death sentence, created a substantial risk of an unreliable "balancing" under Mississippi's death sentencing statute -- where statutory mitigating factors were also present. Whether the Eighth Amendment tolerates such unreliability in the face of statutory mitigating factors is an important question left open last term by Barclay v. Florida, ___ U.S. ___, 103 S. Ct. 3418 (1983).

Respondent's only apposite response is a quotation from Henry v. Wainwright, 721 F.2d 990 (5th Cir. 1983). In Henry, the Fifth Circuit upheld an application of both robbery and pecuniary gain as aggravating circumstances where the trial judge, relying on Barclay, explicitly found no mitigating

circumstances. Thus, Henry does not illuminate the issue left open in Barclay.

Another fact distinguishes Henry. There, the duplicative factors in a Florida statute were weighed by a judge who may have discounted the duplicativeness. Here, the duplicative factors were weighed against mitigation factors by a jury, which was not cautioned or guided regarding the duplicativeness of the Mississippi factors.

Since this petition was filed, the Court decided Pulley v. Harris, ___ U.S. ___, 52 U.S.L.W. 4141 (January 23, 1984), which, unlike this case, dealt with the facial validity of death sentencing statutes -- specifically, whether such statutes had to provide for proportionality reviews. The Court noted that any capital sentencing scheme may produce "aberrational outcomes," but suggested that at least in Pulley such "inconsistencies" did not rise to the level of "major systemic defects identified in Furman." Id., 52 U.S.L.W. at 4145.

Petitioner submits that the present case involves a "systemic defect" in how Mississippi applied the statutory sentencing factors in its balancing scheme. By using the same evidence to invoke two factors to support the sentence of death below, at least one of the duplicative factors became tainted. Without guidance, petitioner's jury was instructed to balance these duplicative factors against statutory mitigating factors established by the evidence (Pet. at 4-5) -- creating a significant risk that the balancing process was unreliable and hence arbitrary. The entire process was thus systemically infected. Although respondent claims that Mississippi law permitted the jury to impose a life sentence notwithstanding this balancing process (Brief in Opposition at 6), the jury was not so explicitly instructed. Indeed, as expounded in

petitioner's Issue No. 3, petitioner's requested instruction to this effect was rejected.

Petitioner's case presents a factually clear and appropriate occasion for the Court to illuminate the issue of when an invalid application of sentencing factors so infects a death sentencing process as to cross the threshold of constitutional impermissibility -- issues not reached in Zant v. Stephens, ____ U.S. ___, 103 S. Ct. 2733 (1983), or in Barclay v. Florida, supra. Respondent cannot and does not dispute that Issue No. 1 is ripe for the granting of certiorari.

2. Respondent does contest the ripeness of petitioner's second issue -- whether Mississippi unconstitutionally applied a vague aggravating factor (that the murder was "especially heinous, atrocious or cruel") by compelling petitioner to reenact before the jury his role in the crime. Respondent misperceives the standard for granting certiorari. Although petitioner at the state level raised the issue below in state law terms, the Mississippi Supreme Court addressed and disposed of the issue in federal constitutional terms. It explicitly reaffirmed its prior holding that Godfrey v. Georgia, 446 U.S. 420 (1980), was a narrow decision limited to its peculiar facts -- and thus Godfrey, in Mississippi's view, did not in any way preclude the forced demonstration to establish whether the murder was "especially heinous, atrocious and cruel." Since the highest state court below reached and decided the federal constitutional issue, certiorari may properly be granted. See, Jenkins v. Georgia, 418 U.S. 153, 157 (1974); Raley v. Ohio, 360 U.S. 423, 436 (1959); Manhattan Life Insurance Co. v. Cohen, 234 U.S. 123, 134 (1914).

3. For similar reasons, respondent misperceives the ripeness of petitioner's Issue No. 3. Although not raised by petitioner's counsel on appeal, the federal constitutional

issue was embraced by two of the dissenting Justices. Hence, it was sufficiently preserved. Gardner v. Florida, 430 U.S. 349, 361 (1977) (when some members of a reviewing court expressly consider a point below, this Court presumes that the entire Court has passed on the question); see Eddings v. Oklahoma, 455 U.S. 104, 114 n.9 (1982).

Petitioner contends that it was constitutional error for the Mississippi trial court to refuse requested jury instructions (a) that death need not be imposed even if the jury found an aggravating circumstance, and (b) that mitigating circumstances need not be found to return a sentence of life. Respondent has now implicitly conceded the validity of these requested instructions under Mississippi law -- by confirming that petitioner's jury had the power to make the very determinations at issue in those instructions:

> In other words, even in the complete absence of mitigating factors, a sentencing jury is not compelled legislatively [in Mississippi] to return a sentence of death no matter how many aggravating factors it has before it.

(Brief in Opposition, at 6).

Since a capital defendant has a constitutional right to present all mitigating considerations that might bear on his sentence, Lockett v. Ohio, 438 U.S. 586 (1978), and to obtain an "individualized" sentence, Zant v. Stephens, supra, it should follow that the same defendant has a constitutional right, consistent with state procedural requirements, to be granted jury instructions that give effect to his mitigating considerations -- particularly when the state sentencing statute supports the requested instructions. Although at least one

federal court has recognized this federal right, Washington v. Watkins, 655 F.2d 1346, 1374 (5th Cir. 1981), cert. denied, 102 S. Ct. 2021 (1982), this Court has not passed on the question.

4. Petitioner contends that once a proportionality review is provided by statute, "due process protections are necessary to ensure that the state-created right is not arbitrarily abrogated." Vitek v. Jones, 445 U.S. 480, 488-89 (1980). This due process guarantee is unaffected by this Court's recent decision in Pulley v. Harris, supra. Indeed, Pulley leaves unanswered fundamental questions of (1) whether appellate review must be "meaningful" and (2) whether states that mandate a proportionality review may conduct that review without any objective criteria being articulated or ostensibly applied by the reviewing court.

This case presents these issues squarely. Petitioner's individual situation is distinct from all Mississippi defendants sentenced to death under its post-Furman death penalty statute. Petitioner's prior record was spotless. (Pet. at 2.) He was neither the triggerman nor the initiator of the crime. (Pet. at 3.) Several statutory mitigating circumstances were established. (Pet. at 4-5.)[1/] In these aggregate respects, petitioner differed from other persons receiving the death penalty in Mississippi. (Pet. at Appendix 8.)

Yet, the Mississippi Supreme Court in its proportionality review did not mention any of these circumstances. No mention was made of how petitioner's individualized circumstances compared with others receiving the death penalty. No reference was even made to the trial judge's sentencing report.

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1/ At the same time, of the four aggravating circumstances found by the jury, three were legally or factually suspect. (Pet. at 5-6).

(Pet. at 24a.) The review was limited (a) to a summary paragraph appearing (with slight variations) in Mississippi's last six death penalty decisions and (b) to a simple listing of post 1977 death penalty cases.[2/]

Respondent does not dispute that the review below was so limited, but instead cites twelve Mississippi cases and contends that a proportionality review by this Court would show petitioner's sentence not to be disproportionate. (Brief in Opposition, at 17.) If such de novo review were appropriate, the Annex to this Reply Brief discloses circumstances that distinguish petitioner's situation from that of the defendants in twelve cases cited by respondents. However, the only matter now properly before this Court relates to be whether a state supreme court, required by statute to undertake a proportionality review of a death sentence, must articulate and apply objective criteria to assure that the review is meaningful.

Petitioner submits that if the question of minimum standards of appellate review are to be addressed in the context of state-mandated proportionality reviews, the present case is an appropriate one to resolve this important issue.

Respectfully submitted,

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2/ See "Comment: Constitutional Problems Concerning Certain Aggravating Circumstances Used for Capital Sentencing In Mississippi," 53 Miss. L. J. 319 (1983).

ANNEX

Factors Distinguishing Petitioner's Case From The Mississippi Death Cases Relied Upon By Respondent

1. Smith v. State, 419 So.2d 563 (miss. 1982) (triggerman, prior criminal record and previous firing of deadly weapon)

2. Edwards v. State, 413 So.2d 1007 (Miss. 1982) (triggerman and prior criminal record including capital murder conviction)

3. Bullock v. State, 391 So.2d 601 (Miss. 1980) (actively beat the victim)

4. *Reddix v. State, 381 So.2d 999 (Miss. 1980) (prior criminal record including two armed robberies and two kidnappings)

5. *Jones v. State, 381 So.2d 983 (Miss. 1980) (prior criminal record including armed robbery)

6. Culberson v. State, 379 So.2d 499 (Miss. 1979) (triggerman, prior criminal record including armed robbery and assault with intent to kill)

7. *Voyles v. State, 362 So.2d 1236 (Miss. 1978) (triggerman)

8. *Irving v. State, 361 So. 2d 161 (Miss. 1978) (prior criminal record including burglary)

9. *Washington v. State, 361 So.2d 161 (Miss. 1978) (triggerman, prior criminal record)

10. *Bell v. State, 360 So.2d 1206 (Miss. 1978) (prior criminal record including capital murder, two robberies, two burglaries and assault with intent to kill)

11. Evans v. State, 422 So.2d 737 (Miss. 1982) (triggerman, prior criminal record and under life sentence when murder committed)

12. Wheat v. State, 420 So.2d 229 (Miss. 1982) (triggerman, prior criminal record including second degree murder, assault with weapon and false imprisonment)

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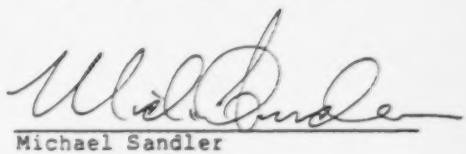
* Death sentence was subsequently vacated by federal court:

Reddix v. Thigpen, 554 F. Supp. 1212 (S.D. Miss. 1983); Jones v. Thigpen, 555 F. Supp. 870 (S.D. Miss. 1983); Voyles v. Watkins, 489 F. Supp. 901 (N.D. 1980); Irving v. Hargett, 518 F. Supp. 1127 (N.D. Miss. 1981); Washington v. Watkins, 655 F.2d 1346, 1374 (5th Cir. 1981); Bell v. Watkins, 692 F.2d 999 (5th Cir. 1982).

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of February, 1984, a copy of this Reply Brief On Petition For Writ of Certiorari To The Supreme Court of the State of Mississippi was mailed, postage prepaid, to Edwin Lloyd Pittman, Attorney General, Post Office Box 220, Jackson, Mississippi 39205.



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